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AND

In the Bail Court,

BY

ARTHUR WILSON,
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OF

THE COURT OF QUEEN'S BENCH.

XXXVI VICTORIA.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXVI VICTORIA.

RIMINI *v.* VAN PRAAGH.

1872
Nov. 8.

Bankrupt—Promise to pay Debt barred by Discharge in Bankruptcy—Bill of Exchange—Want of Consideration—24 & 25 *Vict. c.* 134, *s.* 164—32 & 33 *Vict. c.* 83, *s.* 20.

By s. 164 of the Bankruptcy Act, 1861, a promise to pay a debt barred by the certificate of discharge is made void. By s. 20 of 32 & 33 Vict. c. 83 the whole of the Act is repealed; but the repeal is not to affect the past operation of any enactment repealed, or affect any right accrued or restriction imposed before the commencement of the Act by or under any such enactment.

A debtor and his creditors entered into a deed of composition while the Act of 1861 was in operation, which deed was to have the effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by the above section, the debtor gave a bill of exchange to one of his creditors, who was barred by the composition deed, for his old debt:—

Held, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void.

DECLARATION on two bills of exchange, dated respectively the 2nd and 20th of January, 1870, drawn by J. Van Praagh on the defendant, to the drawer's order, and accepted by the defendant, and indorsed by the drawer to the plaintiff.

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Plea: That before the drawing or acceptance of the said bills, or either of them, the defendant carried on business in partnership with the said J. Van Praagh as a diamond merchant, and he and J. Van Praagh were indebted to the plaintiff, and divers other persons, and thereupon a deed was made between the plaintiff and J. Van Praagh and their said creditors, in the words and figures following:—"This deed made the 13th of July, 1869, between Benjamin Van Praagh (the defendant) and Joseph Van Praagh, diamond merchants, of the one part, and Jonah Jonas, wholesale jeweller, on behalf of and by and with the assent of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh, of the other part, witnesseth that the said Benjamin Van Praagh and Joseph Van Praagh do hereby grant, bargain, sell, assign, transfer, and set over unto the said Jonah Jonas absolutely all their estate and effects whatsoever, to be applied and administered for the benefit of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh in like manner as if the said Benjamin Van Praagh and Joseph Van Praagh had been at the date hereof duly adjudged bankrupt; and in consideration of the premises each of the creditors of the said Benjamin Van Praagh and Joseph Van Praagh doth by these presents release the said Benjamin Van Praagh and Joseph Van Praagh from his and their respective debts in like manner as if the said Benjamin Van Praagh and Joseph Van Praagh had obtained a discharge in bankruptcy." And the plaintiff assented to the deed and executed the same, and the defendant did all things, and all things happened, and all times elapsed necessary to make the deed binding on the plaintiff, and the other creditors of the defendant, and the said J. Van Praagh; and after the deed had become binding on the plaintiff, the bills in the declaration mentioned were drawn, accepted, and indorsed to the plaintiff, as in the declaration mentioned; and save as aforesaid there never was any consideration for the drawing, indorsing, acceptance, or payment of the said bills, or either of them, by the defendant; and the plaintiff first received and has always held the said bills without value and with notice of the premises.

Demurrer and joinder.

Littler, in support of the demurrer. The plea is bad. The deed

was only to have the effect of a discharge in bankruptcy, and therefore did not extinguish the defendant's debts, but only discharged him from them so as to bar all the remedies for them. It was given in July, 1869, and therefore was under the Act of 1861, which was then in operation. But by 32 & 33 Vict. c. 83, s. 20 (1), that Act was totally repealed in August, 1869, and the bills were not drawn till January, 1870. At the time, therefore, that the bills were given, s. 164, which made a bill for a debt anterior to the discharge in bankruptcy void, had been repealed; and the parties were remitted to their position at common law, and an express promise to pay an existing debt, although the debtor be protected from legal process for enforcing payment, is good: see note to *Wennall* v. *Adney*. (2) The point was expressly decided as long ago as Lord Mansfield's time in *Trueman* v. *Fenton*. (3) *Flight* v. *Reed* (4) was a similar decision upon the effect of a new promise upon the same consideration as a usurious transaction, after the repeal of the usury laws.

[QUAIN, J. Section 20 expressly saves the effect of the repealed enactments as to all transactions before the repealing Act came into operation.]

L. Kelly, for the defendant. The Court have pointed out the answer to the plaintiff's position. But even without the saving clause, the defence would be good, as shewing a want of consideration. In *Jones* v. *Phelps* (5), Bacon, C.J., irrespective of s. 164, was of opinion that a promise to pay a debt, from which the debtor was discharged by bankruptcy, was a mere nudum pactum without any consideration to support it.

Littler, in reply. The cases already cited were not brought to

(1) 32 & 33 Vict. c. 83, s. 20: The enactments described in the schedule to this Act are hereby repealed [24 & 25 Vict. c. 134, the Bankruptcy Act, 1861, in toto]; but this repeal shall not affect the past operation of any such enactment, or revive any court, office, jurisdiction, authority, or thing abolished by any such enactment, or affect the validity or invalidity of anything done or suffered before the commencement of this Act, or any right, title, obligation, or liability accrued or restriction imposed before the commencement of this Act, by or under any such enactment, or affect any principle or rule of law derived from any enactment contained in the first and secondly mentioned Acts in the schedule to this Act. . . .

(2) 3 B. & P. at p. 249.

(3) Cowp. 544.

(4) 1 H. & C. 703; 32 L. J. (Ex.) 265.

(5) 20 W. R. 92.

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the notice of the Chief Judge in Bankruptcy; and in addition may be cited to the same effect, *Brix* v. *Braham*. (1)

COCKBURN, C.J. I am of opinion that the plea is good. The action is on a bill of exchange given by a debtor for a debt, from which he had been discharged by a deed of composition, which was to have the effect of a discharge in bankruptcy, and which deed was executed at the time that the Bankruptcy Act, 1861, was in operation. By s. 164 of that Act, the effect of a discharge of a bankrupt was, that a promise to pay, or security given for a past debt, was rendered invalid. After this deed had been executed, by s. 20 of 32 & 33 Vict. c. 83, the whole Act of 1861 was repealed, and in the new Act there is no corresponding enactment to s. 164. And whether the effect of this is, that in the case of a bankruptcy occurring after the Act passed, a bill given for the past debt is valid, I express no opinion. It will be time enough to do so when the necessity arises. The question here is, whether the Act was intended to have a retrospective effect on bankruptcies or deeds of composition under the Act of 1861. It would be a strong thing to suppose that the legislature intended any such thing; and although it may have been intended (and as to that I express no opinion) to do away with any restraint, under future bankruptcies, upon the bankrupt voluntarily promising to pay his past debts, yet it cannot have been intended to apply this to bankruptcies or deeds under the repealed statute. No doubt the policy of the bankrupt laws has changed; but the terms of the repealed section (s. 20), are quite large enough to protect any right or immunity which the debtor enjoyed under the old Act; and he could not bind himself by any promise as to a past debt, so as to deprive himself of the right, in the event of an action being brought on his promise, of setting up his discharge as a defence.

MELLOR, J. I am of the same opinion. The effect of ss. 161 and 164 of the Act of 1861, is to discharge the bankrupt from all his debts; and after the order of discharge he shall not be liable even on a fresh promise to pay the debts; these enactments are

(1) 1 Bing. 281.

now repealed; but as to all past transactions, the repealing section says the old law shall still have operation.

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RIMINI v. VAN PRAAGH.

HANNEN, J. I am of the same opinion.

QUAIN, J. I am of the same opinion. It seems clear, and indeed it was admitted, that the bills given for a past debt discharged by bankruptcy would be void under the old statute. What, then, is the effect of the repeal of this statute? Section 20, while repealing certain enumerated statutes or parts of statutes, has a saving clause, which expressly gets rid of the repeal so far as it affects all bankruptcies and other transactions before the Act passed. But even without that saving clause, the case would fall within the rule stated by Lord Tenterden in *Surtees* v. *Ellison*. (1) "It has long been established, that, when an Act of Parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed."

Judgment for the defendant.

Attorneys for plaintiff: *G. S. & H. Brandon.*
Attorney for defendant: *Edward D. Lewis.*

THE QUEEN *v.* THE GUARDIANS OF THE CHORLTON UNION.

Nov. 11.

Union Assessment Committee Act, 1862 (25 & 26 *Vict. c.* 103) *ss.* 17, 21—*Deposit of amended Valuation List by Committee—Contribution Order, based on non-deposited List, invalid.*

It is a condition precedent to the validity of a valuation list for a parish, under the Union Assessment Committee Act, 1862, which has been altered by the assessment committee, that it should have been deposited by the committee for inspection, as required by ss. 17 & 21, after the alterations; and an order by guardians of a union on a parish for contributions, based on an altered list which has not been so deposited, is invalid.

RULE calling on the guardians of the Chorlton Union to shew cause why a certiorari should not issue to bring up an order for contributions made by the guardians upon the township of Chorlton cum Medlock, on the 26th of April, 1872.

(1) 9 B. & C. at p. 752.

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In March, 1871, the assessment committee of the Chorlton Union made an order (under 25 & 26 Vict. c. 103, s. 26) directing the overseers of the township of Chorlton cum Medlock to make a new valuation of their township; the overseers accordingly made out a new valuation list, which was deposited for inspection on the 22nd of June, and was afterwards transmitted to the committee, in accordance with s. 17.

On the 26th of April, 1872, an order of that date was served on the overseers to pay contributions, under s. 30.

This order was based on alterations made in the assessments in the new valuation list by the assessment committee, to a large amount; but the new valuation list, as altered by the committee, had never been deposited by them, as required by ss. 17 & 21 (1); and no time had been appointed by the committee for hearing objections to the altered list.

This rule was then obtained, on the ground that, by the want

(1) 25 & 26 Vict. c. 103, s. 17: The valuation list for each parish, made and signed by the overseers, or delivered to them, as hereinbefore provided, shall be deposited by the overseers in the place in such parish in which rate-books are deposited or kept, and a copy of such valuation list shall be forthwith delivered to the board of guardians, and the overseers shall give notice of the deposit of such list on the Sunday next following the deposit of such list, and such notice shall be given in the same manner, and all persons assessed or liable to be assessed to the relief of the poor of such parish shall have the like right of inspecting, and of demanding and taking copies of and extracts from such list, as in the case of a poor-rate allowed by the justices, and the overseers shall, at the expiration of fourteen days from the time of the notice given of the deposit of such list, transmit the same to the committee, and any overseer or other ratepayer within the union shall have the right of inspecting and taking copies of and extracts from any of the lists so transmitted.

Sect. 21: Where the committee make any alteration in the valuation of any hereditaments included in, or insert therein any rateable hereditament omitted from, any such valuation list, they shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided concerning the valuation list made by or delivered to the overseers, and shall cause the like notice to be given of such deposit as is required in the case of a valuation list so made or delivered as aforesaid, and shall appoint a day, not less than seven days nor more than fourteen days from the re-deposit of such valuation list, for the hearing of any objections to the valuation list as so altered; and when the committee have heard and determined any such objections, or have made such further alterations, insertions, and corrections in such valuation list, they shall approve the same in manner hereinbefore provided.

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of deposit and notice, the overseers and other parties aggrieved had no opportunity of objecting under s. 18, and of appealing under s. 32; and the list and orders based upon it were invalid.

Pollock, Q.C., shewed cause, and contended that the Act was merely directory.

Manisty, Q.C., and *Collins*, were not heard in support of the rule.

THE COURT (Cockburn, C.J., Blackburn and Quain, JJ.) were clearly of opinion that the new valuation list as altered was invalid, and consequently the order based upon it was also invalid, and they made the rule absolute.

Rule absolute.

Attorneys for prosecutors: *Shaw & Tremellen, for C. Roberts, Rochdale.*

Attorneys for defendants: *Massey, Taylor, & Hales.*

HIGGINS, APPELLANT; HARDING, RESPONDENT.

Nov. 15.

Metropolis Local Management Amendment Act (25 & 26 *Vict. c.* 102) *s.* 77—*Paving of new Street*—"*Land*" *liable*—*Railway.*

10 QB 23
42 LJ 243
9 QBD 44-5

A railway in the metropolitan district was carried across a new street by an arch. On one side of the street the railway was carried forward on arches, and on that side was a strip of land, ten feet wide, left open for the purpose of repairing the arches, this abutted for ten feet on the street. On the other side, the railway was carried forward on an embankment, and the sloping part or buttress of the embankment abutted on the street about thirty-six feet, and at the foot of the embankment was an open space, also about thirty-six feet wide, also abutting on the street, which was left for the purpose of allowing of slips in the embankment. The vestry of the parish, having determined to pave the street, sought to make the railway company contribute, under s. 77 of 25 & 26 Vict. c. 102, as owners of "land" abutting on the street:—

Held, that the above pieces of land, including the slope of the embankment, were "land" within that section.

CASE stated by one of the Metropolitan Police Magistrates, under 20 & 21 Vict. c. 43.

The appellant, who is the secretary to the Hammersmith and

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City Railway Company, was summoned by the respondent, the clerk to the vestry of St. Mary Abbotts, Kensington, for having neglected to pay 54*l.* charged upon the appellant as owner of certain land abutting upon a street called St. Mark's Road, in respect of the paving of the street.

The road in question is a "new street," and the preliminaries required by the Metropolis Local Management Act (18 & 19 Vict. c. 120), and s. 77 of the Amendment Act (25 & 26 Vict. c. 102) had been duly observed.

The appellant, as secretary to the railway, was owner of two pieces of land abutting on St. Mark's Road, one piece, A, on the west side, having a frontage of ten feet to the road; the other, B C, on the east side of the road, with a frontage of seventy-three feet.

The railway crosses St. Mark's Road at right angles on an arch, and is carried west on arches; and from the east side of the road the railway is carried on an embankment projecting at the base thirty feet from the line of arches.

The piece of land A is a strip of land of a uniform width of ten feet, kept and solely used for the purpose of repairing the arches. Of the piece B C, about half is the slope of the embankment, forming part of the railway, and acting only as a buttress or support thereto, and could not be used for any other purpose. And the other half of B C is land purchased by the railway company to allow for the slippings of the embankment, which have taken place, and are likely to take place from the nature of the soil.

The 54*l.* was the estimate in respect of the whole frontage of ten feet and seventy-three feet.

It was contended on behalf of the appellant that he was not liable to contribute in respect of the pieces of land, on the ground that they were mere strips forming part of the railway, and were necessary to its maintenance; and that there was no separate ownership apart from the railway; and that the appellant, as owner of the railway, was not chargeable under the statutes; and further that, assuming the appellant chargeable in respect of the thirty-six feet at the foot of the embankment, he was not chargeable in respect of the embankment itself.

The magistrate found that the piece A was used with the railway, and was necessary for the repairs thereof; and that

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about one half of the land B C is simply a buttress or support to the embankment; but he was of opinion that neither piece had thereby lost its character of land, and he therefore made an order on the appellant for the whole 54*l.*

The question for the Court was whether the appellant was liable to pay the said sum of 54*l.*

Lopes, Q.C. (*R. E. Webster* with him), for the appellant. By 18 & 19 Vict. c. 120, s. 105, the owners of houses in a new street are made liable to contribute to the paving of it; and by s. 77 of 25 & 26 Vict. c. 102, "When any vestry or district board shall, under the powers of the above 105th section, have paved or be about to pave any new street, the owners of the land bounding or abutting on such new street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses," with a proviso that the owners of land may be charged at a less proportion than the owners of houses should the vestry or board think it right so to charge them. In the present case these pieces of land were not land in the sense used in s. 77, one was a mere strip, and part of the other was the embankment of the railway, and all were used for the sole purpose of the line of railway. "Land" means land in its common sense, as a field or garden. In *Angell* v. *Paddington* (1) a church with the strips round it was held not to be a house nor land within the meaning of these Acts; and in *Bowditch* v. *Wakefield* (2) the distinction was taken between the confined language of these statutes, "house" or "land," and the much wider language in the Public Health Act (11 & 12 Vict. c. 63) where "land and premises" is to include messuages, buildings, lands, and hereditaments.

Prentice, Q.C., for the respondent, referred to *Lord Northbrook* v. *Plumstead Board of Works* (3), where a private road was held to be land within s. 77. He was then stopped by the Court.

COCKBURN, C.J. I was not present at the commencement of this case, but, as far as I have heard the argument, I may say that no doubt has been raised in my mind as to these pieces of land being "land" within the meaning of the Act.

(1) Law Rep. 3 Q. B. 714. (2) Law Rep. 6 Q. B. 567.
(3) Law Rep. 7 Q. B. 183.

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BLACKBURN, J. I have also no doubt that these pieces of ground were "land." This was land partly occupied by the embankment of the railway, and partly unoccupied land used for the purposes of the railway. I cannot see how any part of this has ceased to be land. In *Angell* v. *Paddington* (1), I based my decision on the fact that the Church-Building Commissioners could not be owners within the definition of the Act. The cases are quite distinguishable.

QUAIN, J. Section 77 says that owners of the land bounding or abutting upon a new street shall be liable to contribute to the expense of paving as well as owners of houses in the street, that must meet the case of any land abutting upon a street, unbuilt upon, where there is no house, as in this case.

Judgment for the respondent.

Attorneys for appellant: *Young, Maples, & Co.*
Attorneys for respondent: *J. & M. Pontifex.*

Nov. 13.

DENNIS, APPELLANT; TOVELL, RESPONDENT.

Harbours, Docks, and Piers Clauses Act, 1847 (10 *Vict. c.* 27), *s.* 74—*Liability of Owner of Vessel for Damage to Harbour, Piers, &c., however caused.*

Under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage, although the accident be the result of inevitable accident from stress of weather, without any default of those in charge.

CASE stated by Justices of Suffolk, under 20 & 21 Vict. c. 43.

A complaint was preferred against the appellant by the respondent, under ss. 74 & 75 of 10 Vict. c. 27 (2), charging that the

(1) Law Rep. 3 Q. B. 714.

(2) By the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74, the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having charge of such vessel or float, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security be given for the amount of damage: Provided always, that nothing herein

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appellant was the owner of a vessel called the *Ara*, which vessel did damage to the pier and works of the Harwich Harbour Board to the amount of 50*l.*, by striking violently against the pier and works, and breaking parts of the same, the vessel not being under the charge of a licensed pilot.

It was proved, on the part of the respondent, that the appellant's vessel did the damage as alleged in the complaint. But it was proved, on the part of the appellant, that the damage was the result of inevitable accident caused by stress of weather, and did not arise from any wilful act or negligence of the master or other persons in the vessel; and it was contended therefore, on the part of the appellant, that he was not liable for the damage so done.

The justices were of opinion that the appellant became liable, under s. 74, to pay the amount of damage, whether it was the result of inevitable accident or otherwise, and ordered the appellant to pay the Board 50*l.* accordingly.

The question for the Court was whether, the damage having been caused as aforesaid, the appellant became liable to pay for it.

Grantham, for the appellant. No doubt the first clause of s. 74 is general; but it can never have been the intention of the legislature to make the owner of a vessel liable for damage caused to a pier or harbour by stress of weather, without any default on the part of those on board. The generality of the first clause is cut down by the second, which says, those in charge who are in default shall also be liable to make good the damage. The proviso also strengthens this view: why should the owner not be liable when a pilot is on board, if he is to be liable in all cases, even for the act of God.

Philbrick (*H. T. Atkinson* with him), forthe respondent, was not heard.

BLACKBURN, J. The Chief Justice, who has just left the court,

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contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

By s. 75, if the amount of damage claimed do not exceed 50*l.*, it is to be recovered before two justices.

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agreed with us that it is clear that the legislature, whether intentionally or not, has made the owner of a vessel liable for all damage, whether caused by negligence or wilful neglect, or by inevitable accident from stress of weather.

QUAIN, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Batty & Whitehouse, for Chapman, Ipswich.*

Attorney for respondent: *J. L. Morris, for Philbrick & Son, Colchester.*

No. 16.

THE QUEEN *v.* TOMLINSON.

Bastardy—Order of Maintenance—Mistake in Substance—Amendment—12 & 13 *Vict. c.* 45, *s.* 7.

A woman was delivered of a bastard child on the 27th of May, 1870. On the 11th of August she applied for a summons against T. as the putative father, which, on coming on to be heard, was withdrawn. On the 11th of April, 1871, she applied for another summons, which was heard on the 25th of April, when an order was made adjudging T. to be the father of the child, and to pay to the mother 2*s.* 6*d.* per week, from the 11th of August, 1870, until the child should attain thirteen years. The order having been removed by certiorari:—

Held, that as the adjudication was wrong in point of substance, the order could not be amended under 12 & 13 Vict. c. 45, s. 7.

RULE to quash an order of affiliation, which had been brought up upon certiorari.

One Jane Flower was delivered of a bastard child on the 27th of May, 1870. On the 11th of August she applied to a justice of the peace, for a summons on Thomas Tomlinson, who, she alleged, was the father of the child. The summons was issued, but not served till March, 1871, and came on to be heard on the 11th of April, 1871, before the justices at petty sessions; but the woman Flower not being ready with her case, the summons was withdrawn. On the same day, the 11th of April, 1871, a fresh summons was applied for, and issued by another justice of the peace, and after having been duly served on Tomlinson, came on to be heard on the 25th of April, 1871, before the justices at

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petty sessions, when the justices adjudged Tomlinson to be the father of the child, and made an order which, after reciting the application for and issuing of the first summons dated the 11th of August, 1870, proceeded to order that Tomlinson should pay to Flower the sum of 2*s.* 6*d.* per week, from the 11th of August, 1870, until the child should attain the age of thirteen years.

The clerk to the justices, in an affidavit filed for shewing cause, stated that as a series of summonses had been issued against the defendant, the justices believed they might consider the summons of the 11th of April to be a summons issued upon the original information, and made the order for maintenance from the date of the first application, instead of the date of the second application.

McMahon shewed cause. It must be admitted that the order is bad, as the petty sessions had no power to order the payment for the maintenance of the child to be reckoned from the 11th of August, 1870. The order ought to have stated that the payments should be made from the 11th of April, 1871. The question therefore is, whether this Court will amend the order under s. 7 of 12 & 13 Vict. c. 45, which provides "that if upon any return to any writ of certiorari, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shewn to the satisfaction of the Court that sufficient grounds were in proof before the justices, or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the Court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed." On the authority of *Reg.* v. *Higham* (1), the amendment ought to be made.

Kemplay, Q.C., in support of the rule, was not heard.

COCKBURN, C.J. This is not a mistake or an omission in drawing up the order, it is a mistake in point of substance. To make the

(1) 7 E. & B. 557; 26 L. J. (M.C.) 116.

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amendment asked would be to amend the judgment itself; that is clearly beyond the scope of our authority.

BLACKBURN and QUAIN, JJ., concurred.

Rule absolute.

Attorney for prosecutrix: *E. Tyrrell, for E. & A. Tennant, Hanley.*

Attorney for defendant: *Blake.*

Nov. 26.

SIMPSON AND ANOTHER *v.* CRIPPIN AND ANOTHER.

Sale of Goods to be delivered in monthly Quantities—Rescission of Contract.

The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' waggons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5*s.* 6*d.* per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal:—

Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract.

Hoare v. *Rennie* (5 H. & N. 19; 29 L. J. (Ex.) 73) discussed.

DECLARATION on a contract to supply from 6000 to 8000 tons of coal, to be delivered in equal monthly quantities during the period of twelve months, from the 1st of July, 1871. Breach, that the defendants did not deliver the coal monthly, and had refused wholly to deliver the coal and to perform the contract.

Plea, inter alia: That the plaintiffs were not ready and willing to accept the coals, and that the defendants were prevented from delivering the coals, and performing the agreement, by the acts, neglects, and defaults of the plaintiffs.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it appeared that the defendants were coal proprietors, and the plaintiffs were coal merchants. On the 10th of June, 1871,

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the plaintiffs wrote to the defendants the following letter:—"We agree to take from you about 6000 to 8000 tons of your best Wigan four-feet coal, at 5*s.* 6*d.* per ton of 21 cwt. to the ton, put into our waggons at the colliery. Delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½ per cent. discount."

The defendants, by letter also dated the 10th of June, replied as follows:—"We agree to supply you from 6000 to 8000 tons of our best four-feet Wigan coal, properly screened, and free from slack, to be delivered into your waggons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next—strikes of our workmen, accidents, and other circumstances beyond our control excepted—at 5*s.* 6*d.* per ton of 21 cwt. Terms, cash monthly, less 2½ per cent. discount."

On the 8th of July the defendants wrote, complaining that the first week for the fulfilment of the contract had terminated without the plaintiffs sending waggons or orders for coals. The correspondence continued, the defendants requesting that waggons might be sent, and the plaintiffs promising to comply. During the month of July the plaintiffs took from the defendants only 158 tons of coal. On the 1st of August the defendants wrote to the plaintiffs, that inasmuch as the latter had only taken 158 tons during the month of July, and as the sole inducement for the defendants to entertain the contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months, which they had failed to perform, the defendants gave notice that the contract was cancelled. On the 2nd of August the plaintiffs replied, stating that they would not allow the contract to be cancelled.

On these facts the learned judge told the jury, that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants, in point of law, in cancelling the contract, and left the question of damages to them.

The jury found a verdict for the plaintiffs for 475*l.*, leave being reserved to move to enter a verdict for the defendants.

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A rule was afterwards obtained upon the ground that under the circumstances the plaintiffs had disentitled themselves to sue for the breach of the contract, and that the defendants were entitled to cancel the contract, and refuse to deliver the residue of the coal.

Butt, Q.C., and *Commins*, shewed cause. The plaintiffs are entitled to retain the verdict; the defendants could not annul the contract. The case is distinguishable from *Hoare* v. *Rennie* (1); in that case time was of the essence of the contract; and there is another distinction, that in the present case there was a part performance by the plaintiffs in the month of July; but in *Hoare* v. *Rennie* (1) there was a complete breach by the plaintiffs in the first instance. Here the contract is to deliver coals by twelve deliveries independent of each other. The case is governed by *Jonassohn* v. *Young*. (2) This case does not fall within that class of cases, of which *Withers* v. *Reynolds* (3) is an example, that where a breach has been committed which goes to the whole consideration the contract may be rescinded.

Holker, Q.C., and *Baylis*, in support of the rule. The question is, whether the stipulation on the part of the plaintiffs to take coals by equal monthly quantities goes to the root of the contract so that the breach of it entitles the defendants to annul the entire agreement. This is a case in which the breach goes to the whole root and consideration of the contract, within the meaning of the decision of Lord Ellenborough in *Davidson* v. *Gwynne*. (4) This is not a distinct stipulation for the breach of which the defendants might be compensated in damages. The conditions are mutual, and ought to have been performed on both sides, as is laid down in the notes in *Pordage* v. *Cole*. (5) This case is not distinguishable from *Hoare* v. *Rennie* (1), which is supported by *Bradford* v. *Williams* (6), and *Coddington* v. *Paleologo*. (7)

BLACKBURN, J. I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send waggons capable of carrying at least 50 tons, and that by

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.
(2) 4 B. & S. 296; 32 L. J. (Q.B.) 385. 10 Jur. N.S. 43.
(3) 2 B. & Ad. 882.
(4) 12 East, 381, 389.
(5) 1 Wm. Saund. 319*l*.
(6) Law Rep. 7 Ex. 259.
(7) Law Rep. 2 Ex. 193.

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failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of waggons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare* v. *Rennie* (1) is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle *Hoare* v. *Rennie* (1) was decided. If the principle on which that case was decided is that, wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Pordage* v. *Cole.* (2) No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. *Hoare* v. *Rennie* (1) was questioned in *Jonassohn* v. *Young.* (3)

MELLOR, J. I agree generally with what my Brother Blackburn has said; and I think that it is difficult to reconcile *Hoare* v. *Rennie* (1) with some of the other cases which have been cited; but I cannot distinguish that case from the present. Where the facts are not distinguishable, I think we are bound to give effect to the judgment of a Court of co-ordinate jurisdiction. I should have thought, therefore, if the decision depended upon me, that in deference to that case we ought to make the rule absolute, and leave the plaintiffs to appeal.

LUSH, J. I am of opinion that the rule should be discharged. I cannot understand the judgments in *Hoare* v. *Rennie.* (1) The Court must have interpreted the contract in that case as if time were of its essence; there are no words here which import

(1) 5 H. & N. 19; 29 L. J. (Ex.) 73.
(2) 1 Wm. Saund. 319*l*.
(3) 4 B. & S. 296; 32 L. J. (Q.B.) 385.

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such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation.

Rule discharged.

Attorneys for plaintiff: *J. & R. Gole.*
Attorney for defendant: *J. E. Fox.*

Dec. 6.

THE SUNDERLAND LOCAL MARINE BOARD, JUDGMENT CREDITORS; FRANKLAND, JUDGMENT DEBTOR; OLIVER AND BOTTERILL, GARNISHEES.

Garnishment Clauses of Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125, *ss.* 60, 61)—"*Judgment Creditors*"—1 & 2 *Vict. c.* 110, *s.* 18—*Rule or Order of Superior Court.*

By s. 18 of 1 & 2 Vict. c. 110, all rules of courts of common law, whereby any sum of money or costs shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom such moneys or costs shall be payable shall be deemed judgment creditors within the meaning of the Act; and all remedies given by the Act to judgment creditors are given to such persons. By ss. 60, 61 of the Common Law Procedure Act, 1854, any creditor who has obtained a judgment in any superior court may have the debtor examined as to debts due to him; and such judgment creditor may obtain an order attaching the debts due from third persons (the garnishees) to the debtor:—

Held, that a person who had obtained a rule in one of the superior courts, ordering the payment of costs, was not by force of s. 18 of 1 & 2 Vict. c. 110 a judgment creditor within the garnishment clauses of the Common Law Procedure Act, 1854.

Hartley v. *Shamwell* (1 B. & S. 1; 30 L. J. (Q.B.) 223) discussed.

RULE calling on W. A. Oliver, and J. J. D. Botterill, to shew cause why an order of Master Unthank, of the 8th of November, should not be rescinded.

Thomas Frankland obtained in this court a rule nisi against the Sunderland Local Marine Board, for a certiorari to bring up, for the purpose of quashing it, an order of the Board cancelling Frankland's certificate as a master mariner. This rule was discharged on the 7th of May, 1872, with costs against Frankland; and the allocatur of the Master of the Crown Office was given for 55*l.* 5*s.* 8*d.*

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Frankland had employed Messrs. Oliver and Botterill as his attorneys in an action and other proceedings against one Crosby, which had been compromised by the payment by Crosby of a sum of money; and there was, it was alleged, a balance in the attorneys' hands due to Frankland more than sufficient to meet the Board's claim for costs.

The Board accordingly proceeded under the garnishment clauses of the Common Law Procedure Act, 1854 (ss. 60 and 61 of 17 & 18 Vict. c. 125), alleging that they were judgment creditors within the meaning of those sections, by force of s. 18 of 1 & 2 Vict. c. 110 (1); and they obtained a garnishee order nisi attaching the

(1) By 1 & 2 Vict. c. 110, s. 18, "All decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, or of the courts of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons, to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

By s. 20: "Such new or altered writs shall be sued out of the courts of law, equity and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the cases will admit;" . . .

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60, "It shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a master of the court . . ."

By s. 61, "It shall be lawful for a judge, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment

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debt, and calling upon Messrs. Oliver and Botterill, as garnishees, to shew cause why they should not pay to the Board so much of the debt alleged to be due from the garnishees to Frankland as would meet the Board's claim.

This order nisi the Master discharged by an order of the 8th of November, on the ground that the Board were not judgment-creditors within ss. 60 and 61.

An appeal summons against this order of the Master was heard before Lush, J., who referred the matter to the Court.

Nov. 25. *Littler* shewed cause.

Clay, in support of the rule.

The arguments are sufficiently given in the judgment of the Court; besides the cases noticed in the judgment, *Farmer* v. *Mottram* (1) was cited. In addition to the point on which the Court took time to consider, it was urged that the Board, not being a corporation, could not be judgment creditors; but the Court overruled this objection.

Cur. adv. vult.

Dec. 6. The judgment of the Court (Blackburn, Mellor, and Archibald, JJ.) was delivered by

ARCHIBALD, J. This is a rule calling upon Messrs. Oliver and Botterill (the garnishees) to shew cause why an order of Master Unthank, of the 8th of November last, should not be rescinded.

It appeared that the debt from Frankland to the Sunderland Local Marine Board was due upon an allocatur on a rule of this Court (for the sum of 55*l.* 5*s.* 8*d.*), for costs, on a rule by Frankland against the Board, which had been discharged with costs. By the order impugned, the Master declined to attach debts due from the garnishees to Frankland, on the ground that the case was not within s. 61 of the Common Law Procedure Act, 1854; and the question is, whether a rule of court for the payment of money can

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debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

(1) 6 Man. & G. 684.

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be considered a judgment within the meaning and for the purposes of those sections of the Common Law Procedure Act, 1854, which relate to attachment of debts.

The question depends upon the effect to be attributed to the provisions of 1 & 2 Vict. c. 110, s. 18, in connection with those of ss. 60 and 61 of the Common Law Procedure Act, 1854.

It was contended, on shewing cause, that a rule of one of the superior courts of common law for payment of costs, was not a judgment within the meaning of ss. 60 and 61 of the Common Law Procedure Act, 1854, but had merely the effect of a judgment for the purpose of the remedies given by 1 & 2 Vict. c. 110; and in support of this contention reference was made to a decision of the Court of Common Pleas in the case of *Financial Corporation, Judgment Creditors; Price, Judgment Debtor; China Steam Ship and Labuan Coal Company, Limited, Garnishees* (more shortly described as *Re Price* (1)), in which that Court declined to treat a decree of the Court of Chancery, ordering the payment of money, as a judgment within the meaning of the Common Law Procedure Act, 1854, for the purpose of a garnishment order.

On the other hand, it was argued in support of the rule, that, inasmuch as s. 18 of 1 & 2 Vict. c. 110 provides that "all rules of courts of common law, whereby any sums of money, or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons, to whom any such moneys, or costs, charges, and expenses shall be payable, shall be deemed judgment creditors within the meaning of that Act," such a rule must, for the purposes of the attachment clauses of the Common Law Procedure Act, 1854, be regarded in the same light as a judgment in an action, and as answering to the description in s. 60 (embodied in the subsequent sections) of a judgment obtained by a creditor in one of the superior courts.

In support of this contention, the case of *Hartley* v. *Shemwell* (2) decided by this Court in Easter Term, 1861, was cited. In that case an order was made at chambers by Bramwell, B., to attach debts due from third parties towards payment of money directed to be paid by a judge's order. An application for a rule to set

(1) Law Rep. 4 C. P. 155.

(2) 1 B. & S. 1; 30 L. J. (Q.B.) 223.

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aside the order of Bramwell, B., was refused; but the point whether or not an order for payment of money is tantamount to a judgment for the purpose of a garnishment order (though involved in the decision), does not appear to have been put prominently forward, the judgment of the Court proceeding mainly on a different ground.

The facts of the case were, that Hartley having obtained a judgment against Shemwell, a writ of fi. fa. was issued, under which the sheriff had levied on Shemwell's goods; a claim to the goods was thereupon made by one Marples, between whom and Hartley an interpleader issue was directed, in which Marples was successful. Afterwards a ca. sa. was sued out by Hartley on his judgment against Shemwell, under which the latter was arrested. After the verdict on the interpleader issue, Marples obtained an order for payment by Hartley of the costs of the trial, and it was in respect of this order, and whilst Shemwell was still in custody under the ca. sa., that the order of Bramwell, B., was made, by which it was directed that the judgment debt recovered by Hartley against Shemwell should be attached, to answer the costs of the interpleader trial. In pursuance of this order, the amount of the judgment debt was paid by Shemwell to Marples; and a further order was thereupon made by Bramwell, B., for the discharge of Shemwell out of custody.

Under these circumstances, an application was made to the Court to rescind the orders of Bramwell, B., and for leave to issue a new writ of ca. sa. against Shemwell, in satisfaction of the judgment debt; and the main contention was that, as Shemwell was at the date of the garnishment order under arrest on the ca. sa. issued on the judgment in *Hartley* v. *Shemwell*, so that Hartley had lost his right to issue a fi. fa., no garnishment order (such an order being in the nature of a statutory execution) could be made. The Court, however, declined to adopt that view, and refused a rule, considering that the arrest of the garnishee was no extinguishment of the debt, and that it still remained liable to attachment. The reasons for the judgment are not given, and but for an observation of Crompton, J., in the course of the argument, that he thought the order for payment of the costs of the interpleader issue had the effect of a judgment, it might almost be doubted whether the question, to what extent such an order could be

regarded as a judgment, had been raised or brought to the attention of the Court. It is to be observed further that the order in that case was under s. 7 of 1 & 2 Wm. 4, c. 58, the language of which differs to some extent from that of 1 & 2 Vict. c. 110, s. 18. (1)

The case, therefore, can hardly be treated as a clear or positive decision with reference to the point now under consideration.

It was cited in the course of the argument in *Re Price* (2), as an authority for the proposition that a party who has obtained a rule for the payment of costs is a judgment creditor within ss. 60, 61 of the Common Law Procedure Act, 1854; but in giving judgment in that case, Byles, J., remarks, that, as the remedy for the attachment of debts in the hands of third persons did not exist at the time of the passing of 1 & 2 Vict. c. 110, it could not have been contemplated by s. 18 of that Act. The majority, however, of the Court of Common Pleas appear to have decided the case on the ground that many of the provisions of the garnishment clauses are clearly inapplicable to the decrees of the Court of Chancery; and no special reference was made to the question how far they were in other respects to be treated as judgments.

In this state of the authorities, it now becomes necessary to decide the point raised in the present case, viz., whether it was intended to include rules of the superior courts of common law for the payment of money within the description of judgments given in ss. 60 and 61 of the Common Law Procedure Act, 1854; and we are of opinion that it was not.

(1) By 1 & 2 Wm. 4, c. 58, s. 7, "All rules, orders, matters, and decisions, to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments;" . . .

The reporter has examined the affidavits filed in *Hartley* v. *Shemwell*, and it is expressly stated that, pursuant to 1 & 2 Wm. 4, c. 58, the order with the amount of the taxation of the costs had been entered of record. In the reports of the case it does not appear whether the fact of the entry of record was brought to the notice of the Court; it is only stated that the order had been made, and the costs taxed.

(2) Law Rep. 4 C. P. 155.

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We think the observations of Byles, J., already referred to, that the remedy by attachment of debts, not having existed at the time of the passing of 1 & 2 Vict. c. 110, could not have been contemplated by s. 18, are much in point; and from the language of that section, when examined, there can be little doubt that its only object was to extend to rules for payment of money the remedies given by that Act in respect of judgments, but not to constitute them judgments for any other purpose. The language of the section, so far as material, is, that such rules shall have "the effect of judgments of the superior courts of common law, and the persons to whom any such moneys shall be payable shall be deemed judgment creditors within the meaning of this Act." And the section then proceeds to give them all the remedies thereby given to judgment creditors. The words are not, that such rules shall be or be deemed *to be judgments*, but merely that they shall have the *effect* of judgments within the meaning of that Act, and for the purpose of the remedies thereby given to judgment creditors. The concluding words of s. 18, taken in connection with the provisions of s. 20, render it clear that the intention of the legislature was to give a remedy in the Court of Chancery to orders and decrees of that court, and not to constitute them judgments of the courts of common law.

This construction was, before the passing of the Common Law Procedure Act, 1854, put upon 1 & 2 Vict. c. 110, in the case of *Newton* v. *Boodle*. (1) In that case an application to enter on the judgment-roll (thus treating them as judgments) orders charging stock in execution, for the purpose of having them reviewed by a Court of error, was refused, on the ground that they could not be considered in the light of judgments so as to form part of the record. In giving judgment, Maule, J., states: "The statute of Victoria says that such orders shall have the effect of judgments at common law. That only means to give a remedy for disobedience of them, in addition to that which already existed by way of attachment. If the statute had been intended to introduce so great a change as has been contended for, it would have done so by some express terms."

These observations appear strictly applicable to the present

(1) 6 C. B. 532; 18 L. J. (C.P.) 73.

case; for, if such orders were not by the operation of 1 & 2 Vict. c. 110, put for all purposes on the same footing as judgments, then the language of ss. 60 and 61 of the Common Law Procedure Act, 1854, seems wholly insufficient to embrace them.

The terms of s. 60 (embodied by reference in s. 61) are as follows: "It shall be lawful for any creditor, *who has obtained a judgment* in any of the superior courts, to apply," &c.; and s. 64 speaks of "the judgment debt and costs of suit," terms wholly inappropriate to describe a rule or order for payment of money.

We are of opinion, therefore, that the language of these sections is only fitted to describe judgments recovered in an *action*, and that they do not comprise either rules of the superior courts for the payment of money or—as held in the case of *Re Price* (1)—similar orders or decrees of the Court of Chancery.

It might possibly, indeed, have been advantageous if the garnishment clauses of the Act of 1854 had been expressly extended to rules for payment of money; but this we conceive has not been done, and we can only deal with the statute as we find it.

We think, therefore, that the Master was right in refusing an order to attach the debt owing from the garnishees; and that for the reasons given this rule must be discharged.

Rule discharged.

Attorney for Board: *J. B. Hickin, for R. & T. W. Brown, Sunderland.*

Attorneys for garnishees: *John & J. K. Wright, for Oliver & Botterill, Sunderland.*

(1) Law Rep. 4 C. P. 155.

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Nov. 26.

[IN THE EXCHEQUER CHAMBER.]

MAY AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway—Lands required under the Act—Superfluous Lands—Limits of Deviation—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 127—*Lands already vested not divested by subsequent Statute.*

8 C.B.298
30 L.
12 L.D4

By s. 127 of the Lands Clauses Consolidation Act, 1845, lands acquired by a company under their Act, but not required for the purposes of the Act, are to be sold within a prescribed period; and superfluous lands remaining unsold at the expiration of the time limited are "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."

The defendants, a railway company, after notice to treat, purchased by agreement land of the plaintiffs, which they were impowered by their Act to take, and which was marked upon the plans deposited as being partly within and partly beyond the limits of deviation; on part of the land they constructed their railway, and on part deposited chalk and spoil, which in making the railway was excavated from a cutting. After the construction of the railway the defendants, for several years, let the land on which the chalk was deposited to tenants paying rent:—

Held (affirming the decision of the Queen's Bench), by Kelly, C.B., Keating and Brett, JJ. (Martin, B., and Byles, J., dissenting), that the whole of the land was land acquired under the Act, and that the land in which the chalk was deposited was superfluous land, which remaining unsold after the prescribed period vested in the owners of the adjoining lands.

By a subsequent Act obtained by the defendants, they were empowered to retain and hold any lands, belonging to them, which had not yet been applied to the purposes of the company, for a period of ten years from the passing of the Act:—

Held, by the whole Court of Exchequer Chamber, affirming the decision of the Queen's Bench, that this enactment did not defeat a right to unsold superfluous land which had vested, under the Lands Clauses Consolidation Act, at the expiration of the time limited, before the passing of the subsequent Act.

Affirmed by H. of L. 2 R.7 H.L.284

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs on a special case. (1)

The case is fully set out, with a plan, in the report in the court below; but the facts sufficiently appear from the headnote and judgments.

May 15. *Manisty, Q.C.* (*Raymond* with him), for the defendants.

(1) Law Rep. 7 Q. B. 364.

Pinder (*H. T. Cole, Q.C.*, with him), for the plaintiffs. The arguments were the same as in the court below.

Cur. adv. vult.

Nov. 26. The following judgments were delivered:—

MARTIN, B. (1) The facts of this case are these. In the year 1845 a railway company was created called "The Berks and Hants Railway Company." In the year 1846 the interest of this company was transferred to and vested in the defendants. There was a field containing 15*a.* 0*r.* 33*p.*, which was then the property of Jane May, John Simmonds, and Charles Simmonds; the whole of this field was included in the plan and book of reference, but the whole was not included within the limit of deviation delineated on the plan. There was a narrow strip on the northern side of the field beyond the line indicating the limit of deviation. By a notice of the 11th of March, 1846, Jane May, and the other two owners, were required to treat with the defendants for a purchase of portion of the field towards the south, viz., 3*a.* 1*r.* 4*p.*, and the value of this portion was settled by an arbitration at 571*l.* 7*s.* By a further notice of the 5th of November, 1846, Jane May and the other two owners were required by the defendants to treat with them for the remainder of the field, and its value was subsequently agreed at 176*8l.* In both notices it was stated that the land was required for the purposes of the Berks and Hants Railway. By indenture of the 12th of May, 1847, Jane May and the other two owners conveyed the whole field to the defendants in fee simple. Upon the completion of the purchase the defendants took possession of the field, and upon a portion of it, viz., 5*a.* 0*r.* 33*p.* towards the south, constructed a portion of the line and a station, and other works connected with the railway, and upon much the larger part of the remainder deposited chalk and spoil which in making the railway was excavated from a cutting near the field, for the purpose of which deposit the defendants had purchased the whole of the field instead of a portion only. The plan (2) shews the extent of the field covered by the spoil and the extent uncovered. The depth

(1) This judgment was read by Bramwell, B.

(2) See Law Rep. 7 Q. B. 371.

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of the spoil varies from one foot to eight or nine feet, and since the completion of the railway the surface has been used for growing vegetables, for which rent has been paid to the defendants and their servants. The time for the completion of the railway expired on the 30th of June, 1850. On that day the land adjoining to the north was the property of the plaintiffs. The ejectment was brought on the 10th of June, 1869, and the plaintiffs' claim to recover under the 127th section of the Lands Clauses Act (8 Vict. c. 18), the space shewn on the plan, G B F H, as superfluous land, being the space covered by the spoil and the small space uncovered.

The defendants contend: First, That the land is not superfluous land, that it was and is required for the purposes of the undertaking, viz., the deposit of the spoil. Secondly, That the strip of land, M to N on the plan, was not acquired by the defendants compulsorily under the provisions of the Act, but voluntarily by agreement, and that the only land subject to the 127th section is the land south of the line M N, and that the property of the land adjoining thereto on the north was not in the plaintiffs but in the defendants themselves as owners of the strip north of the line M N. Thirdly, That by virtue of provisions of two Acts of Parliament, 24 & 25 Vict. c. cciv. s. 41, which received the royal assent the 1st of August 1861, and 31 & 32 Vict. c. cxlv. s. 20, which received the royal assent the 13th of July, 1868, the defendants are entitled to the land in dispute.

With respect to the last point, if the contest of the plaintiffs be in other respects right, then by virtue of the 127th section of the Lands Clauses Act, the superfluous land vested in and became the property of the plaintiffs on the 30th of June, 1850. The enactment is absolute, there is nothing said about taking possession of the land. The 41st section, above referred to, enacts that the period for the sale of superfluous land now belonging to and vested in the defendants shall be extended for a further period of seven years from the 1st of August, 1861. The plaintiffs seem to me to have two answers to this contention: First, the seven years had expired before the action was commenced; and, secondly, the land did not at the time of the passing of the Act belong to nor was vested in the defendants, because, if the

contention of the plaintiffs be in other respects right, it was vested in and had become the property of the plaintiffs by virtue of the 127th section on the 30th of June, 1850. The enactment in the second Act is that the defendants may retain and hold any lands belonging to them for the period of ten years from the 13th of July, 1868, but if the plaintiffs be otherwise right, the land in question did not belong to them on the 13th of July, 1868, on the contrary it belonged to the plaintiffs. It therefore seems to me that the defendants fail as to this contention. *Moody* v. *Corbett* (1) is an authority to this effect.

By the 8 Vict. c. 20 (the Railways Clauses Consolidation Act, 1845), the company are authorized to take compulsorily the land within the limits of deviation, and by s. 45, in addition to the lands authorized to be compulsorily taken, it was lawful for them to contract, with any party willing to sell, for the purchase of land adjoining or near to the railway, not exceeding a certain prescribed quantity, for, amongst other purposes, any purpose which may be requisite or convenient for the formation or use of the railway, The case of *Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (2) has conclusively determined that, in order to let in the operation of the 127th section, the lands adjoining which confer upon its owners the property in the superfluous land must be adjoining to lands compulsorily taken, and that the section does not apply where the land in respect of which the right is claimed adjoins lands taken by contract or agreement; and as already said, the contention of the defendants is, first, that the adjoining land, in respect of which the plaintiffs claim, does not adjoin upon land compulsorily taken, but upon land acquired by contract. There was no compulsory power under which the strip of land, M N, could be taken; it could only be taken by reason of the owner of it being willing to sell it. The land from M to N southward could have been compulsorily taken, and the owners of land adjoining to the north of the land would be within the 127th section; but the defendants themselves, and not the plaintiffs, were the owners of this adjoining land. The answer of the plaintiffs was, that the defendants had estopped themselves from saying that

(1) 5 B. & S. 859; 34 L. J. (Q.B.) 166; in error, Law Rep. 1 Q. B. 510.
(2) Law Rep. 2 H. L., Sc. 160.

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the whole piece of land was not taken compulsorily, because they had dealt with the land under a notice to treat. In my opinion this is not an estoppel, and the question depends upon the true facts. I think the plaintiffs have failed to bring themselves within the 127th section.

It was further contended, that the land was not superfluous land. The sections relating to superfluous land are introduced by a general heading, "With respect to lands acquired by the promoters of the undertaking which shall not be required for the purposes thereof." These are the lands which the legislature speaks of as "such superfluous lands." Now lands "not required for the purposes of the undertaking" must mean lands acquired, and either never required, or which, having been at one time required, are so no longer for those purposes. There can be no other. The land acquired and sought to be recovered in this ejectment certainly was at one time required for the purposes of the undertaking: *Lund* v. *Midland Ry. Co.* (1); *Lord Beauchamp* v. *Great Western Ry. Co.* (2) Is it so no longer? Has it ceased to be so? It seems to me not; for it is still put to the purposes for which it was required, viz., the holding of the spoil. The only way this argument can be met is to say that the spoil has become part of the land, and that, therefore, the land now serves no "purpose," and therefore is not required and is superfluous. Now, if the chalk put on it had sublimated or sunk through the land into the bowels of the earth, this would be true. But it has not gone from the surface. It is there, though it has been levelled and treated as land to some extent. If, instead of chalk spoil, old brick ends, or clinkers, or other things which could grow nothing had been put there, the plaintiffs' argument could not be used. So, also, if the chalk had been on in shapes so irregular that it could not be used. Suppose the company took any of this spoil, would it be said they had opened a chalk pit, or that they were removing some of the soil and were trespassers? In truth, the land is under the spoil still. The chalk is not part of the land. Nobody describing the place would say chalk was the surface of the land; he would say there was the surface soil with chalk on it. But there are to my mind arguments to the contrary

(1) 34 L. J. (Ch.) 276. (2) Law Rep. 3 Ch. App. 745.

of this argument to be found in the Act of Parliament. By s. 127 the "lands" are to be sold; by s. 128 the "lands" are to be offered to certain persons. Suppose there was such a sale, would not the purchaser have a right to call for the removal of this spoil? Would he not be at liberty to say this is no part of the lands? The lands you are to sell are the lands you bought. Further, the promoters are to sell, within the prescribed period, or ten years after the expiration of the time limited for the completion of the works. This furnishes two arguments—a general one and a particular. The general one is this: It supposes that the superfluousness of the lands will be apparent within the time limited, or the ten years. It supposes, therefore, that the lands are such as have never been required, or required for temporary purposes. To these alone it is applicable. For, suppose a station-house was built on land, and remained for the ten years and more, and then the station was moved and the house pulled down, and the land on it superfluous, in fact. It is clear that would not be within the statute. Neither in this case, for the purpose for which the land was taken and used is and was permanent. The special argument it furnishes is this: The lands must become superfluous within ten years. By the plaintiffs' argument this became superfluous only when it ceased to exist as something on the land by becoming part of the land. When was that? If not within the ten years, it was not within the statute, and where is the evidence to shew it was within the ten years?

My Brother Byles concurs in this judgment.

KELLY, C.B. The plaintiffs claim in this action a quantity of land (about four acres, part of a field formerly of fifteen acres), as superfluous land, or land not required for the purpose of the defendants' railway; and the action is resisted by the defendants on the ground that the land was and is required for the purposes of the Act of Parliament, or, in other words, for the purposes of the railway.

The 127th section of the Lands Clauses Act provides that all such superfluous lands, if not sold within ten years of the completion of the works, shall vest in and belong to the proprietors of the adjoining lands. In this case, the period of ten years has

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elapsed and the land has vested in the plaintiffs, if it was superfluous land within the statute. Of the fifteen acres, about five acres have been used for the purposes of the railway, a portion of the railway and of the station having been constructed upon it. Of the remainder, a considerable portion was originally used as a place of deposit for a quantity of spoil, resulting from an excavation made in order to form a cutting. But this operation and the deposit altogether ceased before, or almost immediately after, the completion of the railway, in June, 1850. And from that time and after the expiration of the ten years in 1860, the spoil deposited consisting principally of chalk, and which had become incorporated with the earth, remained unapplied to the purposes of the railway or to any purpose whatever connected with the undertaking, and the land has been let to persons in the employ of the railway company, and with their permission, as garden ground, or as arable or pasture land, at rents of from 20*s.* to 30*s.* an acre. Indeed, during the last few years, the land has been thus let by the defendants themselves. Under these circumstances, it has been contended on the part of the defendants, that the land having once been applied to the purposes of the Act by the deposit of the spoil upon it, it cannot afterwards become superfluous land, or land not required for such purposes. And, further, that having been used as a place of permanent deposit for the spoil after the act of deposit had ceased, this use of the land is a permanent application of it to the purposes of the Act. In addition to the grounds upon which the judges of the Court below have held that this land became superfluous land and no longer required for the purposes of the Act whenever the deposit had ceased, I may observe that the question turns entirely upon the distinction between lands which, though required for purposes of the Act, are so required for temporary purposes only, and such as are required and used for a permanent purpose. No doubt the land was so required as long as the act of depositing continued; and if the company had thought fit to remove and dispose of the spoil it would still have been so required for some time longer, and until it should have been all removed. But when removed, or having been thrown upon the land without any intention to remove it, it has become part of the soil, the land ceased to be applied to any of the purposes of the

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railway, and, I think, became superfluous land within the statute. It cannot be said that it was one of the purposes of the Act to preserve upon the land a quantity of spoil perfectly useless, and which never had been, and was never intended to be, applied to any purpose connected in the remotest degree with the business of the railway. When, therefore, the deposit ceased, and there existed no intention of removing the spoil, I agree with the Court below, that the land, being no longer required for the purposes of the Act, became superfluous land within the meaning of the 127th section. If indeed, it were one of the purposes of the Act to keep a quantity of spoil upon the land for ever without any use being made either of the spoil or of the land, the case would be otherwise. But the proposition seems to me self-contradictory, when correctly stated, that a piece of land of some few acres in extent is required for the purposes of an Act of Parliament, because it contains a quantity of spoil upon its surface; the railway company having no occasion for the purposes of the railway to take or use the smallest portion of the spoil or a single foot of the land of which it has become a part.

The case has been put of a house built upon land for the residence of a station-master. But this, no doubt, is a permanent and legitimate purpose, and land so used is as much applied to the purposes of the Act as the land upon which the station itself is built, or the railway itself constructed. And when it is asked: suppose the station-master to be otherwise provided for, or the station itself to be disused, so that the land would be no longer required for the purposes of the Act, could the case come within the 127th section? The answer is that it could not; for although it is undoubtedly contrary to the policy of these Acts of Parliament that land, which becomes useless for the purposes of the railway, at whatever time such may be its condition, should nevertheless be retained and applied to other purposes unconnected with the railway and for the profit of the company; yet, such a case may, and often does occur, long after the expiration of ten years from the completion of a railway, and neither the 127th section nor any other provision of the general Acts of Parliament has provided for such a case. But where land is purchased generally for the purposes of the Act, and though so used and applied, is used and applied for a

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temporary purpose only, which ceases before, or a short time after, the completion of the railway, it seems to me liable to be dealt with in the same way as if, although purchased for the purposes of the Act, it had never been so used or applied at all.

Upon the literal construction of the Act, then, it should seem that when the deposit of the spoil had ceased, and the land had therefore ceased to be required for the purposes of the Act, the case at once came strictly within the express terms of the 127th section. But we must consider whether it is not within the real and actual intention of the legislature. That object was that railway companies should be confined in the property they are permitted to purchase, as well as in their dealings and traffic, to the means and powers and authorities necessary to the carrying on of the business of their railways. They may purchase and hold lands for the purpose of constructing upon them railways and stations and bridges and other necessary buildings and works. But they may not either purchase or hold land to let it out for profit, as arable or pasture or garden grounds, whether to their own officers or servants, or others. If, therefore, in this case it were permitted, as soon as the construction of their railway and the excavation and deposit of the spoil in question were complete, to hold the ten acres of land, and let it as arable or pasture or garden ground at substantial rents, to be received for their own use and profit, the provisions of the 127th section of the Act, and the policy of all the Railway Acts that have ever been passed in this country, would be at once defeated.

But it is also contended that by the Acts of 1861 and 1868, the time for the sale of superfluous lands by the company has been enlarged, and the title of the plaintiffs, if they had acquired a title, divested, and the land restored to the defendants. If the enlarging clauses of these Acts applied only to the railway in question, the argument might be urged that it must govern the case of all superfluous lands acquired under the Act for that railway, inasmuch as the ten years allowed by the 127th section having already expired, if the clauses did not apply to these lands they would be nugatory and useless, and would have no application at all. Though even in this case I should have thought that the words, "belonging to the company," would have saved the right of the

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adjoining proprietors in whom the lands had already vested, and to whom they belonged, seeing that the Act alleged to take away their rights was a private Act, obtained furtively and behind the backs of the parties interested against it, by a trading company, for their own benefit; and as annihilating vested rights, it ought to be construed most strictly against the promoters. But when we look to the general enactments of the Acts of 1861 and 1868, and the schedules, and the language of these two clauses themselves, we find that they apply to nearly, if not entirely, the whole of the Acts, and the whole of the railways belonging to the Great Western Railway, and among which there are many where the period of ten years had not elapsed since the completion of the railways, and consequently where the superfluous lands still belonged to the company; and I cannot bring myself to entertain a doubt that it was to the superfluous lands acquired under these Acts, and to these only, and which still belonged to the company, and had never passed to the adjoining proprietors, that the clauses applied enlarging the time for the sale of such lands for the term provided beyond whatever remained of the ten years limited by the 127th section.

It has also been urged against the plaintiffs, upon the authority of *Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (1), that the land in question has been purchased by agreement, and not under the provisions of the Company's Act, and therefore cannot become superfluous land within the meaning of s. 127. It is true that where land has been purchased by a railway company for extraordinary purposes, and under a voluntary agreement, it is not within that section, which applies only to lands acquired under the provisions of the Railway Act. But this land was not acquired for extraordinary purposes or under a voluntary agreement, but strictly under the provisions of the Act. The answer given to this argument by Blackburn, J., is conclusive (2); he refers to s. 16 of the Act for making the railway (8 & 9 Vict. c. xl.), which enables the company "to enter upon, take, and use such of the said lands as shall be necessary for such purpose," the said lands being the lands described in the plans deposited under the Act, and which comprises the whole of the lands in question. This land was purchased upon

(1) Law Rep. 2 H. L., Sc. 160. (2) Law Rep. 7 Q. B. at p. 382.

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notices duly given, accepted, and acted upon, and under conveyances made pursuant to those notices and to the above section. They are not, therefore, lands purchased for extraordinary purposes, or under a voluntary agreement, and so not within the case of *Glasgow Union Ry. Co.* v. *Caledonian Ry. Co.* (1)

Upon these grounds I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed, and in this opinion my Brother Keating and my Brother Brett concur.

Judgment affirmed.

Attorneys for plaintiff: *Johnson & Weatheralls.*
Attorneys for defendants: *Young, Maples, & Co.*

Nov. 26.

MOORE *v.* THE METROPOLITAN RAILWAY COMPANY.

Master and Servant—Railway Company, responsibility of for Acts of Servants —Implied Authority to Arrest—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 103 *and* 104.

The plaintiff was a passenger by the defendants' railway with a return ticket from M. to N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2*d.* This he refused to do. He was thereupon given into custody by the inspector of the defendants' station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the defendants. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment:—

Held, that, as the defendants were empowered under s. 104 of the ~~above~~ Act, to arrest persons committing frauds under s. 103, and as the inspector was their representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendants to arrest persons supposed to be guilty of committing offences against that section, and that the defendants were liable for his mistake.

DECLARATION that the defendants assaulted the plaintiff and gave him into custody and compelled him to appear before a magistrate upon the charge that he, being a passenger on the defendants' railway, had refused, on arriving at Edgware Road Station, to deliver up his ticket or to pay his legal fare, and thereby had defrauded the defendants of 2*d.*

(1) Law Rep. 2 H. L., Sc. 160.

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Plea: Not guilty. Joinder in issue.

At the trial before Lush, J., at the Middlesex sittings after Hilary Term, 1872, the following facts were proved:—The plaintiff was a passenger by the defendants' railway, and was travelling with a return ticket from Moorgate Street to Notting Hill. When the train arrive at the Edgware Road Station, on the way to Notting Hill, the plaintiff got out, but the ticket collector told him that the return ticket he had was not available for that station, and demanded a fare of 2*d*. The plaintiff refused to pay, and afterwards offered to pay on a receipt being given to him; this the ticket collector declined to do, and called an inspector of the station, who, on hearing the facts, sent for a policeman and gave the plaintiff into custody. He was taken to the police station and charged before the magistrate the next day with refusing to give up his ticket or pay his fare, thereby defrauding the company. The magistrate dismissed the case.

Upon these facts the learned judge ruled that there was no implied authority from the defendants to the station inspector to arrest the plaintiff, and directed a nonsuit.

A rule was afterwards obtained for a new trial, on the ground that the defendants were liable for the false imprisonment of the plaintiff by their officials under ss. 103, 104, 108, 109, 110, and 154 of 8 Vict. c. 20. (1)

(1) 8 Vict. c. 20, s. 103: If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings.

Sect. 104. If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants, and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law.

Sect. 154: It shall be lawful for any officer or agent of the company, and all persons called by him to his as-

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M. Chambers, Q.C., shewed cause. The company have authority under s. 104 to arrest for offences committed against s. 103, and therefore the only authority that can be supposed to exist in the inspector is to arrest for those offences. But the alleged fraud with which the plaintiff is charged was not an offence specified in s. 103, and it follows that there was no implied authority in the inspector to give the plaintiff into custody. Section 154 must be confined to arrests for offences against the bye-laws of the company. *Goff* v. *Great Northern Ry. Co.* (1) is not applicable, because in that case there was a power to arrest on the assumption that the facts were as the officer arresting supposed. *Poulton* v. *London and South Western Ry. Co.* (2) is in point. This case is governed by the law as laid down in *Allen* v. *London and South Western Ry. Co.* (3), and *Edwards* v. *London and North Western Ry. Co.* (4)

Lewis Glyn, in support of the rule, was not heard.

BLACKBURN, J. The facts of this case bring it within the authority of *Goff* v. *Great Northern Ry. Co.* (1) The nonsuit, therefore, ought to be set aside. I think that there was evidence that the person who gave the plaintiff into custody was acting with the authority of the defendants. *Goff* v. *Great Northern Ry. Co.* (1) was a well considered case, and the principles there laid down have never been deviated from. Where a railway company are carrying on business there are certain things which are necessary to be done for the carrying on of the business, and the protection of the company, and there are things which if done at all must be done at once, and therefore the company must have some person on the spot to do these things, a person acting with common prudence and common sense, clothed with authority to decide as the exigency

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sistance, to seize and detain any person who shall have committed any offence against the provisions of this or the special Act, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient dispatch before some justice without any warrant or other authority than this or the special Act; and such justice shall proceed with all convenient dispatch to the hearing and determining of the complaint against such offender.

(1) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

(2) Law Rep. 2 Q. B. 534.

(3) Law Rep. 6 Q. B. 65.

(4) Law Rep. 5 C. P. 445.

arises what shall be done. *Giles* v. *Taff Vale Ry. Co.* (1), which was followed by *Goff* v. *Great Northern Ry. Co.* (2) laid down the rule that if such person intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible, because he was their agent. *Goff* v. *Great Northern Ry. Co.* (2) also decides that where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot who is acting as if he had express authority, is primâ facie evidence that he had authority, and the presumption that he had authority must be rebutted by the company. The facts of this case are, that the plaintiff had a ticket which authorized him to travel as far as Notting Hill Station; but if he wished to get out at Edgware Road, a station which the train reaches before it gets to Notting Hill, he would not be permitted to get out at Edgware Road without paying 2*d.* more than he had paid for the whole distance to Notting Hill. The plaintiff did get out at Edgware Road, and if the plaintiff meant to get out at Edgware Road with a view to defraud the company of the sum of 2*d.*, it would be a plausible thing for the company to say that he had violated the first part of s. 103. I do not, however, say that it would be an offence under that section. At all events, the company's agent would have to determine whether the act of the plaintiff was within that section, and to consider whether, acting for the company on the spot, he should exercise his authority and give the plaintiff into custody. Being placed on the spot by the company for the express purpose of determining whether he shall exercise the power he has, the inspector makes a mistake, and the company are responsible for the consequences of that mistake. It has been argued that unless the plaintiff had committed an offence under s. 103 the inspector at the station had no authority from the defendants to give the plaintiff into custody, and consequently the defendants were not liable; but if this were so, there never would be an action against a railway company for false imprisonment. If the plaintiff had committed the offence there would have been a defence upon the merits. It is upon the ground that the servant

(1) 2 E. & B. 822; 23 L. J. (Q.B.) 43.

(2) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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of the company has made a mistake that the company are liable. *Poulton* v. *London and South Western Ry. Co.* (1) has been cited, but if that case be examined, it will be seen that it does not conflict with the present decision. There the station-master had given the plaintiff into custody for not paying the fare for a horse. The company themselves could not have given the plaintiff into custody for that; and therefore the authority of the railway officials to decide what should be done on the exigency of the moment did not arise. There was no more power in that case for the company to give authority to the servant to consider and determine whether a person should be given into custody or not than there would have been to give him authority to consider whether he should assault a passenger. But *Goff* v. *Great Northern Ry. Co.* (2) and the present case are different. In both these cases there were things which the company were obliged to leave to the discretion and determination of their servant, and he had to exercise the power entrusted to him for their benefit. There was, therefore, a primâ facie case for the jury. It may be that this might work a hardship on the company, but it would be much harder upon the passengers if substantially they had no remedy when the company's servants made a mistake. I do not rely upon s. 154; ss. 103 and 104 are sufficient to shew that the nonsuit was erroneous.

MELLOR, J. I am of the same opinion. No doubt s. 103 was passed with the intention of protecting the revenue of the company. I agree that by ss. 103 and 104 power is given to the defendants to arrest and detain persons acting fraudulently, and in order to carry out these provisions some person must be at the station to protect the interests of the defendants, and in case he is of opinion that an attempt to commit any of the specified frauds has been made, he is clothed with authority to act upon the emergency, and to decide as best he may whether the supposed offender ought to be arrested. Now the inspector was clearly mistaken, but I think that the company are liable if their official did not exercise a sound discretion. The arrest was within the scope of his authority to protect the company's interests, and to prevent the commission of the frauds specified. I think *Poulton* v. *London*

(1) Law Rep. 2 Q. B. 534. (2) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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and South Western Ry. Co. (1) clearly distinguishable; in that case no person had power to arrest the plaintiff, and therefore the agent of the defendants had no implied authority to do an act which the company itself could not have done. But in this case the company had authority to arrest if the offence had been committed, and it is to be assumed, in the first instance, that the inspector had authority vested in him to act on the company's behalf, and it is for them to shew that the inspector was not authorized to arrest the plaintiff.

LUSH, J. I am of the same opinion. I now think the view I took of the facts at the trial was erroneous, for this case cannot be distinguished from *Goff* v. *Great Northern Ry. Co.* (2) It is to be presumed that the inspector had authority from the company to exercise for their benefit the powers conferred upon them by ss. 103 and 104. The inspector supposed that the ticket authorized the plaintiff to get out at Notting Hill only, and not at Edgware Road, and that therefore the plaintiff had ridden from Moorgate Street to Edgware Road without any ticket authorizing him to take that journey. The inspector thought erroneously that this was done with a fraudulent intent, and intending to act under the 103rd and 104th sections, he gave the plaintiff into custody. I think that in the absence of evidence to the contrary, it is to be inferred that the inspector had authority to arrest for offences under those sections.

Rule absolute.

Attorney for plaintiff: *Knox.*
Attorneys for defendants: *Burchells.*

(1) Law Rep. 2 Q. B. 534. (2) 3 E. & E. 672; 30 L. J. (Q.B.) 148.

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Nov. 26.

[IN THE EXCHEQUER CHAMBER.]

DUNN AND ANOTHER *v.* THE COMPANY OF PROPRIETORS OF THE BIRMINGHAM CANAL NAVIGATION.

Canal Company—Rights and Liabilities as between Canal Company and Owners of subjacent Mines.

10 QB 454
7 QBD 423
8 QBD 92

The defendants' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

The canal having been constructed and used for many years, the plaintiff, who was owner of coal mines under the canal, gave defendants proper notice of his intention to work them; defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having

brought water into the canal, so carelessly and improperly managed the canal and the water, that the water escaped and flooded plaintiff's mine.

On the above facts, the Court having power to draw inferences:—

Held, affirming the judgment of the Queen's Bench, that an action of tort could not be maintained.

Semble, by Kelly, C.B., and Pigott, B., that the plaintiff was entitled to compensation under the Act.

ERROR from the judgment of the Queen's Bench in favour of the defendants on a special case. (1)

The declaration alleged that plaintiffs were lawfully possessed of a coal mine, and that defendants brought large quantities of water into a canal near the mine, and so carelessly and improperly managed the canal and the water therein, that the water escaped and flooded the mine, whereby the mine was damaged.

The material pleas were: 1st, not guilty; 3rdly, except as to the charge of negligence and improper conduct, that the water was brought into the canal in pursuance of certain Acts of Parliament authorizing the construction and maintenance of the canal; that the coal mine near to and under the canal was not worked till after the completion of the canal, and that the water escaped out of the canal into the mine without any negligence or default on the defendants' part. Issue joined.

The facts of the case and the several clauses of the Acts of Parliament are set out at length in the report in the court below (1), and they sufficiently appear from the head-note.

The question for the opinion of the Court was, whether the defendants are liable to the plaintiffs for the damage sustained by them, and how the findings on the issues were to be entered.

Huddleston, Q.C. (with him *J. O. Griffits*), for the plaintiffs. First, the defendants having power, on notice of the plaintiffs' intention to work the mines, to inspect and purchase them, on their refusal the plaintiffs were remitted to their rights at common law, just as if the Act of Parliament had not passed; and then the defendants are liable, without any negligence on their part, on the principle of *Fletcher* v. *Rylands*. (2)

[CHANNELL, B., referred to the late case of *Smith* v. *Fletcher*. (3)]

(1) Law Rep. 7 Q. B. 244. (2) Law Rep. 3 H. L. 330.
(3) Law Rep. 7 Ex. 305.

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In *Wyrley Canal Co.* v. *Bradley* (1), under precisely similar enactments, the Court were of opinion that "if the company declined the purchase, as they had done in this case, the coal owners were left to their common law rights as if no canal had been made." The judgment of the Court in *Dudley Canal Co.* v. *Grazebrook* (2), which was under this very Act, is to the same effect; and Lord Chelmsford, C., and Lord Cranworth, in *Great Western Ry. Co.* v. *Bennett* (3), adopted the principle of that judgment. *Stourbridge Canal Co.* v. *Dudley* (4) is to the same effect. [He also referred to *Fletcher* v. *Great Western Ry. Co.* (5); *Bagnall* v. *London and North Western Ry. Co.* (6), and *Barber* v. *Nottingham and Grantham Ry. Co.* (7)] Secondly, if negligence must be shewn, then there was negligence in the defendants in not purchasing, or in not keeping the water out during the plaintiffs' working. [As to this he cited the judgment of Hannen, J., in the court below. (8)] Lastly, an additional argument in favour of the plaintiffs may be urged, by reference to the compensation clauses of the Act. The majority of the Court of Queen's Bench seemed to think that they would apply to the present case; but it is to be observed that "mines," although occurring in other clauses, does not occur here: see pp. 1603–4. (9) If then the plaintiffs are not entitled to compensation, they must be entitled to maintain this action, otherwise they are left without remedy for a most grievous wrong.

[GROVE, J. That argument, as well as the first proposition put forward by the plaintiffs, is answered by *Vaughan* v. *Taff Vale Ry. Co.* in this court. (10)]

H. Matthews, Q.C. (with him *H. James, Q.C.*, and *Jelf*), for the defendants, was not heard.

KELLY, C.B. I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

(1) 7 East, 368, at p. 372.
(2) 1 B. & Ad. 59.
(3) Law Rep. 2 H. L. 27, at pp. 39, 41.
(4) 3 E. & E. 409; 30 L. J. (Q.B.) 108.
(5) 4 H. & N. 242; 28 L. J. (Ex.) 147; 5 H. & N. 689; 29 L. J. (Ex.) 253.
(6) 7 H. & N. 423; 1 H. & C. 544; 31 L. J. (Ex.) 121, 480.
(7) 15 C. B. (N.S.) 726; 33 L. J. (C.P.) 193.
(8) Law Rep. 7 Q. B. at pp. 281–3.
(9) Law Rep. 7 Q. B. at p. 246.
(10) 5 H. & N. 679; 29 L. J. (Ex.) 247.

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The plaintiffs are the owners of a coal mine under a canal of which the defendants are the proprietors, and which they were and still are using under the provisions of several Acts of Parliament.

It is essentially necessary to look at the precise terms of the declaration in order to apply them to the facts of the case, and so to determine the questions submitted to us. The declaration charges that while the plaintiffs were owners of the coal mine the defendants brought large quantities of water into the canal near the mine, and so carelessly and improperly managed the canal and water that the water escaped into and flooded the coal mine, whereby the plaintiffs sustained damage, &c. So that, striking out the charge of negligence, the defendants are charged with nothing but that they brought water into the canal near the plaintiffs' mine. The defendants, under their many Acts, are possessed of the canal, with full power to use it for the benefit of the public and for the purpose of carrying on the business of a canal in the ordinary way; and they had therefore full power to bring the water where it was brought; and the only question arising in the case is, whether the defendants have been guilty of negligence in the management of the canal; for it would be evidently absurd to treat as a cause of action the bringing of the water into the canal. The same question is more specifically raised on the special plea, and it is clear that on the facts the plea is strictly proved.

The facts are these. The defendants having constructed their canal many years ago, under the powers of the Act of 16 Geo. 3, which is the only Act to which it is necessary to refer, the plaintiffs or their predecessors in title had never been minded to work their mine until recently. The plaintiffs, however, being so minded, gave notice, as they were required to do under the Act, to the defendants of their intention to work the mine. The defendants might then have inspected the mine, and they had power, if they thought it for their interest to do so, to purchase the mine. They were not, however, obliged to purchase; they might, if they thought fit, abstain from availing themselves of the power in the Act of purchasing the mine, and continue to use their canal, carrying on the business of the canal, and taking their chance as to

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whether any damage might be occasioned to the plaintiffs, they being bound in that event to make compensation in some way or other, either under the compensation clauses in the Act, or in an action, as in the present case. The defendants abstained from inspecting or purchasing the mines, and it turns out that the plaintiffs, having proceeded to work their mine, and to excavate under the canal, so weakened the foundation that the water penetrated through the bottom into the mine, and no doubt inflicted on the plaintiffs very considerable damage; and the question is, whether, under the circumstances found in the case, the defendants are liable for that damage in this action.

It has been contended for the plaintiffs in the first place, and authorities were cited for the proposition, that on the facts and under the provisions of this Act, in the event of the defendants refusing to purchase, the plaintiffs had a full right to work the mines just as if no Act had been passed and no canal constructed. I entirely agree to that proposition, which needed no authority to support it, that the plaintiffs were entitled to work their mine, and the canal company had no remedy for any damage that might ensue to the canal, they being only entitled to the surface of the land. I agree that the plaintiffs have done no more than they were entitled to do, and that no action could be maintained by the defendants against them; but the question here is whether, the water having penetrated through the bed of the canal into the mine, the plaintiffs can maintain this action against the defendants for the damage done.

The defence of the company is, that this is an action for negligence, and that the action cannot be maintained except on proof of negligence, which is expressly negatived by the case; and looking at the declaration, I think that is clear—that the action cannot be maintained, the negligence being negatived, inasmuch as it was not an unlawful act to bring the water into the canal, as the defendants had the absolute power to construct the canal and keep it filled with water under their Act. Consequently I agree that the defendants would be entitled to judgment; but as Hannen, J., dissented from the majority of the Court of Queen's Bench, and various other propositions have been put forward on the part of the plaintiffs, and authorities cited in support of them, I think

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it so far necessary to consider those arguments as to shew that, in any point of view, the plaintiffs cannot maintain this action.

It was contended that, if this action could not be maintained, the plaintiffs would be without remedy, as the compensation clauses were not applicable. If that were so, then no doubt the legislature have inflicted a grievous injustice upon the proprietors of mines. But still, under the authority of the case (1) to which reference has been made, if the canal company have done no more than the legislature have authorized them to do, and damage results, and although there may be no clauses in the Act affording compensation, no action can be maintained.

But I feel bound to say, speaking only for myself, that I entertain no manner of doubt that, upon the clauses in this Act, the plaintiffs would be entitled to compensation for the injury sustained by them by reason of the canal company having carried on the business of a canal, in other words, having exercised the powers of the Act, although lawfully. I will refer first to page 1592 of the Act (2), which seems to be clear and decisive on the subject. After authorizing the company to construct the canal and carry on the business of a canal in the usual way, so as to make it available for the public, the Act proceeds: "doing as little damage as may be in the execution of the powers granted to them, and making satisfaction, in manner hereinafter mentioned, for all damages to be sustained by the owners of such lands, tenements, or hereditaments respectively, as shall be taken or prejudiced in or by the execution of all or any of the powers of this Act." It is by the execution of the powers of the Act, that is, by bringing water into the canal, and keeping it there, that the plaintiffs' mine, which is an hereditament within the meaning of the Act, is prejudiced in the manner stated in the case. Therefore it seems to me that, upon this clause, it is perfectly clear that the plaintiffs are entitled to compensation for the damage caused by this lawful exercise of the powers of the Act. If any doubt existed, I think it would be at once removed by the clause at p. 1603 (2), which empowers the commissioners "to determine and adjust what distinct sum of money shall be paid by the company, as a recompense

(1) *Vaughan* v. *Taff Vale Ry. Co.* 5 H. & N. 679; 29 L. J. (Ex.) 247.

(2) See Law Rep. 7 Q. B. at p. 246.

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for any damages which may be at any time or times whatsoever sustained by such bodies politic, &c., or other person or persons respectively, being owners of or interested in any lands, grounds, tenements, or hereditaments, for or by reason of the making, repairing, or maintaining the said canal, . . . or by reason of the execution of any of the powers herein contained by the company." I think, under the provisions of the Act, it is obvious that, where damage has been sustained by owners of any hereditament, which a coal mine is, by reason of the execution of the powers of the Act, that is to say, in maintaining and managing the canal, in other words, keeping the canal full of water, without which there could be no navigation, that is a matter for compensation. But I have looked in vain for any ground for the proposition of the plaintiffs' counsel, even if the compensation clauses do not apply, that this action can be maintained for damage caused by the lawful exercise of the powers of the Act, which the keeping the canal filled with water beyond all question is.

Reference has been made to the judgment of Hannen, J. He seems to have held that the company were liable to this action by reason of their having failed to do something which they were bound to do, and which if done would have prevented the damage. Mr. Huddleston, as far as I understood him, said there was negligence. First, the defendants might have purchased the mine. It is clear under the Act, that though they had the option of purchasing after notice of intention to work the mine, they were not bound to do so, and therefore there can be no negligence in not having purchased. It was for them to consider what was best for their own interest, seeing they are liable to pay compensation, if, by lawfully exercising the power of the Act, they inflict damage on persons whose property may be near.

Then it was argued that the defendants might have prevented the damage by drawing off the water; and it was said that, because they had done so for some time for their own purposes, that shewed that they might and ought to have done so, if they did not choose to purchase. But they had a right, and the very object of their Act was, to keep the navigation open; and to say that there was an obligation upon them in a given event to draw off the water, is to say that they were bound under the Act to render

their canal useless. The proposition is almost self-evidently untenable.

Then the question has been raised whether the charge of negligence is absolutely negatived in the case. On looking at the case from par. 19, to the end, though the case is lengthened out, and the statements are not in the most perspicuous form, it appears that the defendants had managed their canal properly, and had been guilty of no negligence, unless it was negligence to keep the water in the canal; and this I have already disposed of.

In whatever point of view, therefore, the case is considered, whether in substance or as to the particular form of the declaration and the plea, it appears that the defendants have done no more than the Act authorized them to do; and having lawfully exercised their powers, they are protected from any action whatever for the consequences of their acts.

I think, therefore, the judgment must be affirmed.

BRAMWELL, B. I am of opinion that the judgment should be affirmed. It seems to me that my Brother Mellor put the question upon its true footing. He says (1), "No action at law will lie unless there be a legal injury and resulting damage. Now what is the 'injuria' here? Is it the declining to purchase the mines after notice? The defendants were under no other obligation to do so than such as might result from a sense of their own interest. Is there any obligation or duty to be implied which they have not fulfilled? The only obligation upon them must be found, directly or by necessary implication, in the language of the statute; and as it appears to me, they have fulfilled every obligation imposed upon them by it." He says a great deal more, very pertinent and valuable, but which it is not necessary to quote now. Is not what I have read true? and can any answer be given, as to what the "injuria" is, unfavourable to the defendants? The injuria is certainly not in making the canal, and having the water in it, because that they have a right to do; that was no injuria. What is it that they have done or failed to do which is wrongful on their part? Hannen, J., seems to think that there are two possible cases, or rather the alternative of two cases. He says (2), "Upon

(1) Law Rep. 7 Q. B. at p. 273. (2) Law Rep. 7 Q. B. at p. 281.

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the facts stated in the special case, I think it appears that the drowning of the plaintiffs' mines was not the necessary consequence of the execution of the powers of the Act, but might have been prevented by the defendants. This mischief might have been prevented in one of two ways: either by purchasing the mines"—that is to say, they might have avoided drowning these mines by preventing them being the plaintiffs' mines, there is no doubt about that; but they were under no obligation to prevent them from being the plaintiffs' mines—" or by drawing off the water,"—which is equivalent to not having the canal there at all. It seems to me that those are two things which they were under no obligation to do: there was no injuria in their not purchasing the mines, and no injuria in having the water. It appears to me, therefore, there is no injuria in this case, and the action is not maintainable.

There is another way of putting it. I do not like special pleading tests, if they be purely special pleading tests, but looking at the declaration and pleadings as a logical test, I would ask whether they are not demonstrative that the plaintiffs are not entitled to recover? The plaintiffs say the defendants brought water into the canal near to the coal mine. To that the defendants say, " We admit we did bring it there, but we had a right to do so under the Act of Parliament." That part of the plea is proved and is true. Then the declaration goes on to state, " and so carelessly and improperly kept and managed the said water and canal that the water escaped;" that is negatived upon the facts found by the arbitrator. He states that they did not do it carelessly or negligently. If this were a question of mere statement it would be for us to amend it, if necessary, but in my opinion, this could not be amended. The plaintiffs have properly, truly, and logically stated their case; first of all they say the water was there and they had a right to complain; and if the defendants had power to bring it there under the Act of Parliament, then they say, " you managed it improperly," and that the defendants deny and disprove. It seems to me to be almost demonstrated, when one looks at the pleadings, so concisely putting the case on the one side and the other, that the defendants are entitled to our judgment.

Whether or not the plaintiffs are entitled to anything under the

compensation clauses, is not a matter that, in one sense, properly arises here. The fact, however, that they are so entitled, certainly would go to make the construction of the Act of Parliament or the conclusions at which we arrive more probable. If there is no compensation in the Act, then there is a damnum absque injuriâ by authority of the legislature, as in the case mentioned by my Brother Grove, of *Vaughan* v. *Taff Vale Ry. Co.* (1)

I cannot agree with the reasoning of Hannen, J., where he says, for the purpose of shewing that this is not a case for compensation, but for action: "It was, therefore, a wrongful act on their part to keep the water in the canal without having taken the means in their power, by the expenditure of a certain sum of money, to prevent the mischief which has happened. The defendants knew, or ought to have known, that the probable result of working the mines would be to let the water through." (2) The legislature knew that probably the result of the canal being there, or the possible and not unnatural result, would be that water would get through, and they have certainly in other cases, if not in this, provided for compensation. I may here repeat the remark that I made, that if there has been any wrongful act here in the defendants, or wrongful omission, they might have been restrained or compelled by injunction, and I should like to know how it would have been possible for an injunction to have ordered or compelled the defendants to do anything that they have not done.

It seems to me that the defendants are entitled to our judgment.

CHANNELL, B. I agree with my Lord Chief Baron and my Brother Bramwell in affirming the judgment of the Court of Queen's Bench. I think that this action is not maintainable. Some other matters have been adverted to in the course of the argument, as to which I think it is unnecessary to give any opinion.

KEATING, J. I also agree that the judgment should be affirmed, and that this action is not maintainable. The only possible view put forward by Mr. Huddleston under which this action could be maintained was, that under this Act of Parliament the refusal of the defendants to purchase the plaintiffs' mine imposed upon them

(1) 5 H. & N. 679; 29 L. J. (Ex.) 247. (2) See Law Rep. 7 Q. B. at p. 281.

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an obligation in all events to secure the water of the canal from getting into the plaintiffs' mine if they worked it. If that were so, it might be well urged that a duty was created, and a breach of duty took place, and that the case was brought within the authority of the case of *Fletcher* v. *Rylands*. (1) But I can discover no such duty resulting from this Act of Parliament, and if there was none, it is necessary to prove there was negligence, or, at least, improper or careless management, on the part of the defendants. But it is distinctly negatived by the case that there was any such careless or improper management of the canal.

With regard to the compensation, I agree that it is not necessary to decide the point. When I say that, I must not be supposed as casting the slightest doubt upon the opinion expressed by my Lord Chief Baron; indeed, I would go on to say that if compensation cannot be given a gross injustice will have been perpetrated; but that will be, as my Lord observed, by the authority of the legislature. I should hope, therefore, that the construction which my Lord Chief Baron has put upon the statute would be the construction ultimately to be adopted; and I have no doubt the Courts would take every means to give the fullest effect to the words in the statute, in order to give the compensation to which the plaintiffs are certainly in point of justice entitled.

PIGOTT, B. I agree that the judgment should be affirmed, and I do so upon the short ground that the defendants have only done what they have done under the powers of the Act of Parliament. They have done nothing negligently, but have confined themselves strictly to the powers conferred upon them by the statute. When we have to consider the question as to whether an action will lie, I cannot agree with the judgment of Hannen, J., upon that point. I think we are bound to find out, in order to determine whether the action lies, whether the plaintiffs are entitled to compensation in one of two ways. I think it clear that they are entitled to compensation under the clauses which have been referred to; but it is sufficient to say that it is clear that they are not entitled to recover damages by action. No authority is to be found during all the time that canals have existed; and although many actions have

(1) Law Rep. 3 H. L. 330.

been brought by canal proprietors against coal owners, no actions have been brought by coal owners against canal proprietors. I am therefore of opinion that under the powers of this Act of Parliament no such action as the present is maintainable.

GROVE, J. I am of the same opinion. As to the question of compensation, I may observe that in the preamble of the Act it is stated that the making of the canal will be of particular advantage to the owners of collieries and other mines, and so on. I do not say that this *is* the reason, but this may have been the reason prevailing in the minds of the legislature why the mine owners should take some slight contingent risk upon themselves. Therefore I do not see that necessarily an injustice will be done if there be not compensation, because it may be that the legislature thought the mine owners would have sufficient compensation by the making of the canal. It is quite unnecessary, however, to express an opinion upon that point, because I am of opinion upon the other grounds that the action is not maintainable.

DENMAN, J. I am of the same opinion. I have nothing to add to the judgment of my Brother Bramwell, in which I entirely concur.

Judgment affirmed.

Attorney for plaintiffs: *Warmington, for Warmington, Dudley.*

Attorneys for defendants: *Tucker & Lake, for Ingleby, Wragge, & Evans, Birmingham,*

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May 30.*

COSTON AND OTHERS *v.* BLACKBURN AND WIFE.

Practice—Contempt in not answering Interrogatories—Rule or Order—Common Law Procedure Act, 1854 (17 *&* 18 *Vict. c.* 125), *s.* 51—*Personal Service—Common Pleas of Lancaster*—32 *&* 33 *Vict. c.* 37, ss. 6, 7, 15.

9 CO 26, 80
10 CP 54-5

In a cause in the Court of Common Pleas at Lancaster, an order was granted by the district prothonotary to administer interrogatories to the plaintiff to be answered within ten days. The order with the interrogatories was served on the plaintiff's attorneys; and an order for further time to answer obtained by them. The interrogatories not having been answered within the further time, a rule was obtained in the Court of Queen's Bench for an attachment against the plaintiff, on the ground that the plaintiff had by not answering the interrogatories been guilty of a contempt under the Common Law Procedure Act, 1854, ss. 51, 100, and that by force of 32 & 33 Vict. c. 37, ss. 6, 7, and 15, the proper mode of proceeding was by rule in any one of the superior courts. On cause being shewn, the Court held the proceedings regular, and made the rule absolute.

RULE calling upon the plaintiffs to shew cause why a writ of attachment should not issue against them for their contempt in not answering in writing by affidavit the questions contained in the interrogatories, delivered pursuant to an order of the district prothonotary of the Court of Common Pleas at Lancaster, of the 4th of March, and the further order of the 5th of April, 1872.

This action was brought in the Manchester District of the Court of Common Pleas at Lancaster, and by an order of the 4th of March the district prothonotary ordered certain interrogatories to be answered by the plaintiffs in ten days. The order with the interrogatories was at once served on the plaintiffs' attorneys, and after some negociation they applied for and obtained, the defendants not opposing it, an order, on the 5th of April, for ten days' further time to answer.

This order not having been obeyed, the above rule of this Court was obtained in Easter Term (the 2nd of May), on the ground that under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 51, 100, the plaintiffs had been guilty of a contempt (1),

* Decided in Trinity Term.

(1) 32 & 33 Vict. c. 37, s. 6: "It shall be lawful for the chancellor of the said duchy and county palatine for the time being, with the advice and consent of the chief justice and one of the justices for the time being of the

and that by force of 32 & 33 Vict. c. 37, ss. 6, 7, and 15, the proper mode of proceeding was by rule in any one of the superior courts. This rule was afterwards enlarged to Trinity Term.

Court of Common Pleas at Lancaster, from time to time to make and publish general rules for the following purposes, that is to say—1. For empowering the prothonotary or district prothonotary, or some or one of them, to do any of such things, and to transact any of such business, and to exercise any of such authority and jurisdiction in respect of the Court of Common Pleas at Lancaster, as by virtue of any statute or custom, or by the rules and practice of Her Majesty's Court of Queen's Bench, Common Pleas, and Exchequer of Pleas at Westminster, or any of them respectively, are now done, transacted, or exercised by a judge of the said courts sitting at chambers, and as shall be specified in any such rule; but every order made and thing done under this power shall be subject to appeal, and liable to be discharged as hereinafter provided. . . . 4. For providing for the hearing by one or more of the judges of the court, either within the county palatine or in London or Westminster, of any appeal or application to the court, or for the hearing of any demurrer or special case, or obtaining or hearing of any rule or order or application of or to the said court."

Sect. 7: "Any such matter as last aforesaid may be heard and determined by any of the superior courts at Westminster, either sitting in banco, or by any one of the judges of the said courts at chambers, when, according to the practice of such court, such matter would be heard by a single judge at chambers. Upon the hearing of any such matter the court, or such superior court at Westminster, or judge may make such order as to costs as may be just."

Sect. 15: "Every writ and judgment, and every rule and order and process of the court shall and may be enforced in the same manner, and shall have the same effect as if it were a writ, judgment, rule, or order, or process of one of the superior courts at Westminster, and all sheriffs and others shall obey the same and act accordingly."

By Rule 4 of the rules published in October, 1869, the prothonotary is empowered to do all which a judge of any superior court can do, in the words of s. 6, subs. 1, with certain exceptions not material for the present case.

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 51, "In all causes in any of the superior courts, by order of the court or a judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the court or a judge may, at any other time, deliver to the opposite party or his attorney, . . . interrogatories in writing, upon any matter as to which discovery may be sought, and require such party . . . within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party . . . omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the court or a judge shall allow, shall be deemed to have committed a contempt of the court, and shall be liable to be proceeded against accordingly."

By s. 100 this enactment applies to the Court of Common Pleas at Lancaster.

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R. G. Williams shewed cause. There are three objections against this rule for an attachment. First, the order for interrogatories has not been made a rule of court; secondly, the order was only served upon the attorneys, and there has been no personal service on the plaintiffs.

[*Baylis*, contrà, as to the second point, called attention to the fact that the order for interrogatories had been enlarged at the plaintiffs' instance.]

Thirdly, the not answering the interrogatories cannot be treated as a contempt of this court. As to the first objection, according to the usual practice, the order must first be made a rule of court; secondly, the Court will not make an exception to the universal rule of not granting an attachment without personal service of the order which has been disobeyed. *Seafield* v. *Pratt* (1) will be relied on by the other side, but in that case only a rule nisi was granted.

[*Baylis*, contrà. The rule was afterwards made absolute. (2)]

That case, then, it can hardly be denied, is an authority for the defendants on the first two points, as the circumstances there were precisely similar, an order had been obtained and served on the attorney, and afterwards the time enlarged, and there was no rule and no personal service.

[LUSH, J. By s. 51 of the Act of 1854, the interrogatories are to be delivered to the party or his attorney, and the disobedience by not answering within the prescribed time is made a contempt.

BLACKBURN, J. My doubt, when the rule was moved, was, whether the not answering interrogatories, under an order in a cause in the Court of Common Pleas at Lancaster, made by the prothonotary of that court, could be treated, without more, as if a contempt of this court had been committed. But on looking at the different sections of the statute (32 & 33 Vict. c. 37), they would seem to justify the proceedings.

LUSH, J., referred particularly to s. 15.]

That section refers only to rules in the nature of final process. And ss. 6 and 7 are not wide enough to justify the present proceedings. The order for interrogatories ought either first to have been made a rule of this court, or else the application ought to

(1) 5 L. T. (N.S.) 580. (2) 5 L. T. (N.S.) 674.

have been made to the two judges who are the chief judge and puisne judge for the time being, and form the Court of Common Pleas at Lancaster.

Baylis, in support of the rule, was not called upon.

PER CURIAM (Blackburn, Mellor, and Lush, JJ.) The rule must be made absolute.

Williams asked for further time to answer.

BLACKBURN, J. The rule must be absolute for an attachment in the terms of the rule nisi; the writ to lie in the office, and if the interrogatories are not answered within a fortnight, or within such further time as the district prothonotary may grant, the defendants to enter up judgment of non pros.

Rule absolute accordingly.

Attorneys for plaintiffs: *Pritchard & Englefield, for Grundy & Coulson, Manchester.*

Attorneys for defendants: *Milne, Riddle, & Mellor, for Cunliffe & Leaf, Manchester.*

McCAWLEY *v.* THE FURNESS RAILWAY COMPANY.

Nov. 15.

Railway Company—Carrier of Passengers—Passenger travelling "at his own risk"—"Wilful and gross Negligence."

Declaration, that plaintiff was a passenger by defendants' railway, and they so negligently conducted themselves in the management of their railway that an engine and tender came into collision with the train in which plaintiff was travelling, and he was injured thereby. Plea, that defendants received plaintiff to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that plaintiff should travel at his own risk. Replication, that it was by reason of the gross and wilful negligence of defendants that the accident happened. On demurrer:—

Held, that the replication was bad; for that, whatever gross or wilful negligence might mean, plaintiff, by the terms on the pass, had agreed that defendants should not be liable for the consequences of any accident happening in the course of the journey for which they would otherwise have been liable.

DECLARATION: That plaintiff was received by defendants as a passenger to be by them safely and securely carried upon their

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railway on a journey from Piel Pier to Carlisle, for reward to defendants, yet defendants did not safely and securely carry plaintiff upon the said railway on the said journey, and so negligently and unskilfully conducted themselves in relation thereto, and in managing the railway and the traffic thereon, that an engine and tender ran into and came into collision with the train in which plaintiff was, and plaintiff was thereby greatly injured.

Plea, that defendants received plaintiff to be carried under a free pass from Piel Pier to Carlisle, as a drover accompanying cattle which defendants had contracted to carry, under an agreement whereby it was, amongst other things, provided that any drover accompanying cattle during the transit from Piel Pier to Carlisle should travel at his own risk.

Replication, that it was by reason of gross and wilful negligence and mismanagement of defendants in relation to the matters in the declaration mentioned that the alleged grievances were committed by defendants.

Demurrer and joinder.

Crompton, in support of the demurrer. The plea is a good answer to the declaration; and the replication is bad. The plaintiff was to be carried at his own risk, which is equivalent to saying that the defendants were not to be liable for any accident, however caused; and in *Carr* v. *Lancashire and Yorkshire Ry. Co.* (1) and *Austin* v. *Manchester, &c., Ry. Co.* (2) this was held to exclude liability even for gross negligence. In *Hinton* v. *Dibbin* (3) it was held that the Carriers Act, which says that carriers shall not be liable for loss of certain goods unless their nature is declared, protected a carrier, although the loss was caused by his gross negligence and wilful default.

Butt, Q.C. (*Murphy* with him), for the plaintiff. "At his own risk" can only be intended to apply to the ordinary risks of a traveller, and cannot be extended to accidents caused by gross or wilful negligence, such, for instance, as if the company were knowingly to use an unsafe carriage. In *Phillips* v. *Clark* (4) a

(1) 7 Ex. 707; 21 L. J. (Ex.) 261.
(2) 10 C. B. 454; 21 L. J. (C.P.) 179.
(3) 2 Q. B. 646.
(4) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

clause in a bill of lading, that the shipowner should not be liable for leakage or breakage, was held not to exclude liability where the breakage was caused by negligent stowing.

[BLACKBURN, J. In *McManus* v. *Lancashire and Yorkshire Ry. Co.* (1) it was held that a condition that the owner should undertake all risk of conveyance was unreasonable, because it protected the company from the consequences of injury, though caused by their own misconduct. This is a decision directly in favour of the defendants upon the construction of this agreement.]

Crompton was not heard in reply.

COCKBURN, C.J. I think that the plea is good, and the replication bad. The terms of the agreement under which the plaintiff became a passenger exclude everything for which the company would have been otherwise liable. They would have been liable for nothing but negligence, and they would have been liable for negligence whether gross or of a minor degree; and so far, under ordinary circumstances, the passenger would have been carried at their risk. But it was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable.

BLACKBURN, J. I am of the same opinion. The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of manslaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would of course be quite a different

(1) 4 H. & N. 327; 28 L. J. (Ex.) 353. 5 Jur. N.S. 651.

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thing were an action brought for an independent wrong, such as an assault, or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and "at his own risk" would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement.

Mellor, J. I am of the same opinion. The plaintiff became a passenger on unusual terms; the company agreed to allow him to travel under a free pass on the terms that he travelled at his own risk. That clearly exempts the company from all liability for the consequence of any accidents occurring in the course of the journey; and I cannot see how the declaration is to be explained or extended by the replication. As to wilful negligence, like my Brother Blackburn, I am at a loss to say what that means; but the effect of the agreement set out in the plea is to exempt the company from liability for all negligence.

Quain, J. The declaration is founded, as it must be, on the negligence of the company by their servants; for a carrier of passengers is not, like a carrier of goods, an insurer. But the agreement under which the plaintiff became a passenger amounted to saying that the defendants should not be liable, as they otherwise would be, for the consequences of an accident caused by their negligence. The question then is whether the replication takes the case out of the contract. I think it clearly does not. Negligence, even gross, is the very thing which the contract stipulates that the defendants shall not be liable for; and "wilful" cannot carry the case any further, especially as the company would not be liable for a wilful act of commission by a servant, though they would be for his gross negligence.

Judgment for the defendants.

Attorneys for plaintiff: *Gray, Johnston, & Mounsey.*
Attorneys for defendants: *Sharp & Ullithorne.*

WALTERS *v.* COGHLAN.

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Nov. 25.

County Court—13 & 14 *Vict. c.* 61, *ss.* 14, 16; 19 & 20 *Vict. c.* 108, *ss.* 70, 71 —*Appeal—Deposit of Money in lieu of Security for Costs—Memorandum therewith—Acknowledgment of Registrar.*

19 & 20 Vict. c. 108, s. 71 provides that a party required by the County Court Acts to give security "may, in lieu thereof, deposit with the registrar . . . . a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by such registrar . . . . and to be signed by such party, his attorney, or agent, setting forth the conditions on which such money is deposited, and the registrar shall give to the party paying a written acknowledgment of such payment. . . ."

Such sum was deposited by an appellant in the county court, without any memorandum, but the registrar gave an acknowledgment, superscribed with the name of the cause, and expressed in the following terms: "I do hereby certify that the plaintiff has paid into my hands the sum of 10*l.*, to abide the event of the appeal in the above case." The judge having refused to settle and sign a case for the appeal, because no memorandum had been given by the appellant:—

Held, that as the acknowledgment of the registrar embodied the conditions upon which the money was deposited, the requirements of the above section had been substantially complied with, and that, therefore, the case should be settled and signed by the judge.

Griffin v. *Coleman* (4 H. & N. 265; 28 L. J. Ex. 134) followed.

RULE calling upon the judge of the County Court of Staffordshire, holden at Longton, and the defendant, to shew cause why the said judge should not settle and sign a case upon appeal from the decision of the said judge upon a certain plaint, wherein one Henry Walters was plaintiff, and Edward Francis Coghlan defendant, and cause the same to be sealed with the seal of the court.

On the 13th of August, 1872, an action brought in the abovementioned court to recover 50*l.* damages for tort, was tried before the learned judge, who directed a nonsuit. On the 23rd of August the plaintiff gave regular notice of appeal, and, through his attorney, paid into the hands of the registrar 10*l.*, a sum fixed by that officer, as a deposit in lieu of security for the costs of the appeal; but no memorandum was deposited with or required by the registrar, who, however, gave to the party making the deposit a written acknowledgment, superscribed with the name of the cause, and in the terms following, viz.:—"I do hereby certify that the plaintiff has paid into my hands the sum of 10*l.* to abide the

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event of the appeal in the above case." On the 7th of October the judge was called upon to settle and sign the case for appeal, but he formally declined to do so, stating the ground of his refusal to be that no memorandum setting forth the condition on which the money was deposited had been lodged with the registrar, as required by 19 & 20 Vict. c. 108, and that therefore he considered that he was not justified in signing the case presented, as he thought the memorandum a condition precedent.

T. S. Pritchard shewed cause (1). The power of appeal is conferred by 13 & 14 Vict. c. 16, s. 14 (2), provided that the appellant gives security for the costs thereof. By s. 15, the appeal is to be in the form of a case, and s. 16 positively enacts that no judgment *shall* be removed by appeal, save and except in the manner and according to the provisions thereinbefore mentioned. Then 19 & 20 Vict. c. 108, s. 70, enacts that the security required shall be in the form of a bond; and s. 71, that the party may in lieu thereof deposit with the registrar a sum of money, "together with a memorandum, to be approved of by such registrar, and to be

(1) In the Bail Court before Quain, J.

(2) 13 & 14 Vict. c. 61, s. 14, confers upon a party in the county court dissatisfied with the determination of the court in point of law . . . . a right of appeal, "provided that such party shall . . . . give notice . . . . and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event."

By s. 16, "no judgment . . . . shall be removed by appeal . . . . into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned."

By 19 & 20 Vict. c. 108, s. 70, "where . . . . a party is required to give security, such security shall be . . . . in the form of a bond, with sureties, to the other party or intended party . . . provided always that the court in which any action on the bond shall be brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond."

By s. 71, "where by this Act, or any Act relating to the county courts, a party is required to give security, he may in lieu thereof deposit with the registrar . . . . a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by such registrar . . . . and to be signed by such party, his attorney, or agent, setting forth the conditions on which such money is deposited, and the registrar . . . . shall give to the party paying a written acknowledgment of such payment; and the judge of the county court . . . . may on the same evidence as would be required to enforce or avoid such bond, as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just."

signed by such party . . . . setting forth the conditions on which such money is deposited." The giving of this memorandum is, therefore, a condition precedent of the appeal. An interlocutory decision upon a similar point in *Griffin* v. *Coleman* (1), where, although a memorandum had not been given, the acknowledgment of the registrar was held to be sufficient, is relied upon on the other side. But in that case there was delay amounting to waiver of the irregularity, for no objection upon the ground of the want of a memorandum was made until the trial of the appeal; and from the Law Journal Report it appears to have been said that the fault, if any, was in the officer of the county court.

[QUAIN, J. Actus curiæ neminem gravabit.]

But neglect might also be attributed to the party who ought to see that the proper steps are taken. Here, however, the objection was raised as soon as possible, and was not waived. Moreover, in *Griffin* v. *Coleman* (1), no reference was made to s. 16 of 13 & 14 Vict. c. 61, which section is imperative, and prohibits any appeal unless the statutory requirements are observed. In *Park Gate Iron Company* v. *Coates* (2), that section was discussed, but the decision rests entirely upon a waiver of the provisions requiring notice of appeal and security to be given within a certain time. He cited also *Furber* v. *Sturmey*. (3)

H. Holroyd, in support of the rule. First, the deposit of a memorandum is not a condition precedent of the appeal. That document is merely intended to inform the registrar of the purposes for which the money is paid in. If they are otherwise brought to his knowledge, it is enough. The acknowledgment given in the present case plainly shewed the object of the deposit to be understood. That the person paying the money should sign a paper containing the terms on which he pays it, may be desirable, in order to estop him from afterwards disputing them; but the provision as to his signature, in s. 71, is only for the protection of the officer. Moreover the money is to be paid out, not according to any memorandum, but, by s. 71, as the judge shall direct. Secondly, if the memorandum was a condition precedent, it has been waived.

(1) 4 H. & N. 265; 28 L. J. (Ex.) at p. 134.

(2) Law Rep. 5 C. P. 634.

(3) 3 H. & N. 521; 27 L. J. (Ex.) 454.

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[QUAIN, J. Not by the parties.]

No; but it is not prescribed for their benefit, but for that of the registrar, who has waived his right by accepting the sum without a memorandum, and giving a receipt embodying the conditions which would have been stated in the bond had such security been lodged; *Griffin* v. *Coleman* (1) is exactly in point; *Hacking* v. *Lee.* (2)

QUAIN, J. I am of opinion that this rule must be made absolute. One reason of my judgment is, that I consider *Griffin* v. *Coleman* (1) to be in point, and I certainly am not disposed to depart from that authority in the slightest degree. It has been argued that the decision in the above-mentioned case rests upon the ground of waiver; the Lord Chief Baron and the other judges of the court do not, however, seem to have placed their judgment upon that foundation, but upon the fact that, by payment of the deposit, and receipt of the acknowledgment from the registrar, the terms of the statute had been substantially complied with. The object of this provision as to the memorandum appears from the successive enactments. The earlier statute required that security for costs should be given on commencing an appeal. Now the security is, by s. 70 of 19 & 20 Vict. c. 108, to be in the form of a bond, which would shew on what condition the money was paid in, and it is provided "that the court in which any action on the bond may be brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond." Then it appears to have been thought desirable that actual money should, at the option of the party, be deposited, together with some memorandum, which would, by analogy to the bond, shew on what condition the sum had been paid in, and that this should be done to the satisfaction of the registrar. Here money is paid in, the registrar does not refuse, but takes the deposit, and, in the receipt which he gives, embodies the condition upon which the sum is paid in, saying, "I do hereby certify that the plaintiff has paid into my hands the sum of 10*l.* to abide the event of the appeal." That acknowledg-

(1) 4 H. & N. 265; 28 L. J. (Ex.) p. 134.

(2) 2 E. & E. 906; 29 L. J. (Q.B.) 204.

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ment is handed to the party making the deposit, who *accepts* the receipt as containing the terms of the payment. Looking at the transaction from this point of view, I think that in the present case, as in *Griffin* v. *Coleman* (1), there has been, for all intents and purposes, a sufficient compliance with the Act of Parliament. Great injustice would be the result, if, when the registrar has informed himself as to the condition, and given an acknowledgment, which is, in fact, a memorandum drawn up to his satisfaction, the party should lose the right of appeal. Moreover, it is to be observed that the same s. 71 further provides that the judge, when the money shall have been deposited, may "order such sum so deposited to be paid out to such party or parties as to him shall seem just." Therefore, with the single exception that the memorandum was not signed by the party paying the money, every other requirement of the section has been substantially complied with.

Rule absolute.

Attorney for plaintiff: *F. C. Greenfield, for A. Young.*
Attorney for defendant: *Tyrell, for E. & A. Tennant.*

FOULGER, APPELLANT; STEADMAN, RESPONDENT.

Nov. 9.

Jurisdiction of Justices—Premises connected with Railway—Wilful Trespass—3 & 4 Vict. c. 97, s. 16.

A railway company were possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. The respondent, not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:—

Held, that the respondent was a wilful trespasser within 3 & 4 Vict. c. 97, s. 16.

CASE stated by one of the aldermen of the City of London under 20 & 21 Vict. c. 43.

(1) 4 H. & N. 265; 28 L. J. (Ex.) at p. 134.

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Information, under s. 16 of 3 & 4 Vict. c. 97 (1), preferred by the appellant, the inspector of the police of the Great Eastern Railway Company, charging that the respondent unlawfully and wilfully did trespass upon certain premises connected with the Fenchurch Street Station of the railway, to wit, Railway Place, and did refuse to quit the same upon request.

It was proved that the respondent drove a cab into Railway Place, the ownership of which is in the company, and which is not a cul-de-sac, but presents the appearance of a public street, and through which foot passengers and carriages are allowed by the railway company to pass. The company allowed the sides of Railway Place, next to the kerb of the footway, to be occupied as cab-stands by cabs, the drivers of which paid to the company a weekly sum for that privilege. About forty cab-drivers, of whom the respondent was not one, made that payment. The respondent refused to leave the stand when requested to do so on behalf of the company.

It was contended on behalf of the respondent, that Railway Place was a public thoroughfare, and that he was not a wilful trespasser.

Upon these facts the alderman was of opinion that the respondent was not wilfully trespassing.

(1) 3 & 4 Vict. c. 97, s. 16. "If any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises) shall in the discretion of such justice forfeit any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty."

The question for the Court was whether the respondent ought to have been convicted.

April 22. *H. S. Giffard, Q.C.* (*Marriott* with him), for the appellant. It is conceded that if there was evidence of a bonâ fide claim which might be sustained at law, the justice would have been right in dismissing the summons; but the respondent came on the ground of the railway company against their consent. He thereby wilfully committed a trespass, for, upon the facts found, there was no evidence of any right in the respondent as one of the public to put his cab upon the stand; and it is no defence to the charge that he fancied that, as one of the public, he had such a right. The fact that he was bonâ fide mistaken does not do away with his liability to be convicted.

J. Brown, Q.C., for the respondent The respondent is charged with a criminal offence. Sect. 16 imposes a penalty, or in default, imprisonment on the offender. There can be no criminal offence, unless there be mens rea. The respondent went on the railway premises to exercise a right; the trespass therefore was not in a criminal sense wilful. *Jones* v. *Taylor* (1) is in point; in that case complaint was made against Taylor under this section for wilfully trespassing on the premises of a railway company, and refusing to quit upon request. The facts were, that Taylor, having a contract with a third person, whose carriage was in the company's premises, to repair it, although he had been prohibited from entering the premises, went there for that purpose, and refused to quit on request. The magistrates refused to convict, and Lord Campbell, C.J., said, "If Taylor was a trespasser, the magistrates were not bound to find that he was a wilful trespasser." According to that case the alderman's decision is correct.

[BLACKBURN, J. *Jones* v. *Taylor* (1) appears to have been little considered. The judgment is very meagre.]

To constitute an offence under s. 16, there must be an intent to commit a wrongful act: *Reg* v. *Bent.* (2)

[HANNEN, J. Is not the trespass wilful if the person who commits it acts under a mistake as to what the law is?]

H. S. Giffard, Q.C., in reply. A guilty mind is not a necessary

(1) 1 E. & E. 20. (2) 1 Den. C. C. 157.

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ingredient to constitute an offence under s. 16. The jurisdiction of the alderman was not ousted by the bonâ fide claim of a right which could not exist in law: *Hudson* v. *M'Rae.* (1)

BLACKBURN, J. I think this case must be decided in favour of appellant. Notwithstanding *Jones* v. *Taylor* (2), we think if a man does intentionally and purposely stay on the railway premises after being requested to leave, he commits a wilful trespass within s. 16 of 3 & 4 Vict. c. 97, although he fancies that he is entitled to remain upon the premises because other drivers are allowed to put their cabs upon the stand, pursuant to certain terms. If there had been a bonâ fide claim of a right, which upon the evidence adduced could exist in law, the alderman would have been bound to hold his hand; but here the defence only amounted to this, that the respondent believed he had a right to stand his cab upon ground which was the premises of the company without their leave. This belief does not prevent the respondent from being a wilful trespasser.

HANNEN and QUAIN, JJ., concurred.

Case remitted accordingly. (3)

Attorney for appellant: *W. H. Shaw.*

Attorneys for respondent: *Lewis & Lewis.*

(1) 4 B. & S. 585; 33 L. J. (M.C.) 65.

(2) 1 E. & E. 20.

(3) The case stood over to ascertain whether the place was "premises connected with the railway;" and this being found in the affirmative, judgment was given for the appellant on November 9. See *White* v. *Feast*, Law Rep. 7 Q. B. 353.

THE QUEEN *v.* W. M. ALLEN, CLERK, VICAR, AND OTHERS, CHURCHWARDENS OF SHOULDHAM ALL SAINTS. 1872 Nov. 13.

Churchwardens, Election of—Right of Perpetual Curate to nominate one—Mandamus—Return.

A perpetual curate is the minister of a parish within the general custom, by which (in conformity with canon 89) the churchwardens are chosen by the joint consent of the minister and parishioners, and if they cannot agree, the minister chooses one and the parishioners the other. And a perpetual curate has therefore a right to take part in the election of churchwardens, in the absence of proof of any other custom.

To a mandamus directing the minister and churchwardens to call a vestry for the purpose of electing a churchwarden by the parishioners, in conformity with the above custom, the churchwardens returned that a vestry was duly held and the minister did not propose a person nor endeavour to obtain the consent of the parishioners to his election; and therefore the parishioners elected two churchwardens. To this the prosecutor pleaded, that the parishioners had before and still denied the right of the minister to choose churchwardens jointly with the parishioners; wherefore the minister, as he lawfully might, nominated his churchwardens without attempting to get the parishioners' consent. On demurrer:—

Held, that the plea was good.

The churchwardens also returned to the above writ (which was tested some time before their year of office expired) that they were now, at the date of the return, out of office. On demurrer:—

Held, that the prosecutor was, notwithstanding, entitled to judgment.

MANDAMUS, to the Rev. William Maxey Allen, clerk, vicar of the parish of Shouldham All Saints, in the county of Norfolk, and to C. J. Selby, J. Bird, and T. Brown, being the churchwardens, or alleged churchwardens, of the said parish, reciting that the parish is an ancient parish whereof for the time being W. M. Allen is the minister having the care of souls therein, and there ought of right to be two churchwardens in the parish, to be chosen in Easter week in each year by the joint consent of the minister and parishioners of the parish, if it may be, but if the minister and parishioners cannot agree upon such a choice, then the minister of right ought to choose one of such churchwardens and the parishioners the other, the minister and parishioners being, at the time of the choice, in vestry duly assembled. And that on Monday in Easter week, in the year 1871, the churchwardens who during the year then last past had served

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in the parish went out of office; and that at a meeting then duly holden in the vestry of the parish, the said Rev. W. Maxey Allen, clerk, then being the minister of the parish, and the parishioners, there and then assembled in such vestry, could not agree upon the choice of two fit and proper persons to be churchwardens of the parish for the year then next ensuing, and thereupon the said Rev. W. M. Allen in due manner chose one Charles Selby, a fit and proper person, to be one of the churchwardens; but the parishioners present at the meeting did not, although requested and required so to do, nor would choose another fit and proper person to be the other churchwarden, but did then unlawfully, and have always ever since refused so to do, whereby the place and office of the said churchwarden has been and still is vacant. And seeing that it belonged to the defendants, or some of them, of right to convene a meeting of the parishioners, being inhabitants, ratepayers of the parish, in order that they may at such meeting proceed to elect, in a due, proper, and valid manner, a person to serve as churchwarden in the said parish for the remainder of the year, the writ commanded them, the said vicar and churchwardens, or alleged churchwardens of the parish, or such of them to whom the same doth of right belong, forthwith to convene a meeting of the parishioners being inhabitants, ratepayers of the parish, in order that they may at such meeting proceed to the due election of a person to serve as churchwarden in the parish for the remainder of this year.

The writ was tested on the 18th of January, 1872, and was on the prosecution of the said Rev. W. M. Allen, clerk.

Return by J. Bird and T. Brown, dated the 11th of May, 1872:

1. That the church of the parish of Shouldham All Saints was heretofore appropriated to the priory of Shouldham, and so remained appropriated until the 15th of October, in the thirtieth year of Henry VIII., on which day the priory was surrendered into the hands of the king, with all the tithes, both great and small, and so remained in the Crown until the 6th of May, in the seventh year of Edward VI., when the same were granted by the king to one Thomas Mildmay, and by mesne assignments became vested in Sir Thomas Hare, Bart., now owner, and that at the time

of the surrender of the priory to the Crown there was not any rector, vicar, or other minister of the parish.

2. That the said W. M. Allen, clerk, is not by reason of the matters hereinbefore returned the minister of the parish, who of right ought to choose or appoint one of the churchwardens for the parish, and that by 31 & 32 Vict. c. 117, s. 2, the said Rev. W. M. Allen is only deemed and styled the vicar of the parish for the purpose of style and designation, but not for any other purpose.

3. That every year, in the parish, from the time whereof the memory of man runneth not to the contrary, and while the said church was so appropriated as aforesaid, and so on until the issuing of this writ, two fit and proper persons have been of right in every year chosen and appointed churchwardens at vestries held for such purpose, and that a vestry meeting was duly holden, as in the writ alleged, on the day therein stated, viz., the 10th of April, and thence by adjournment on the 17th of April in the following week, but that the said Rev. W. M. Allen did not at such meeting in due manner choose or nominate the said Charles Selby as such churchwarden, as in the said writ alleged, nor did he endeavour to obtain the consent of the parishioners, nor ascertain by putting the question as chairman or otherwise, whether the parishioners were so agreed, or would consent jointly with himself to the choice of two churchwardens for the ensuing year, nor did he in any way choose, nominate, or appoint, at the said vestry the said C. Selby as a churchwarden for the then ensuing year, and thereupon the parishioners in vestry assembled proceeded to choose, and did choose, the said J. Bird and T. Brown, as and for the two churchwardens for the year ensuing, as of right there ought to be yearly chosen to serve such office, whereby the said offices became full until Easter week of this year.

4. That since the issuing of this writ, on Monday in the Easter week of this present year, at a meeting of the parishioners in vestry duly assembled, and of which the said Rev. W. M. Allen was chairman, J. Bird and T. Brown duly attended in discharge of their said offices, and brought in their accounts, which were duly examined and passed, and thereupon gave up and relinquished their office for the year for which they had been so chosen as aforesaid.

Demurrer and joinder.

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5. Fifth plea, to the third paragraph of the return, that before and at the time of the alleged meeting the parishioners wholly denied the right and title of the said prosecutor to choose and nominate jointly with them, or otherwise, churchwardens of the parish, wherefore the prosecutor did not endeavour to obtain the consent of the parishioners, nor to ascertain whether they would consent jointly with himself to the choice of two churchwardens, but nominated, as he lawfully might, the said C. Selby as churchwarden without making such endeavour to obtain the consent of the said parishioners, or to ascertain whether they would consent jointly with himself to the choice of two churchwardens for the said parish.

Demurrer and joinder.

Arthur Charles, for the prosecution. The return is bad. The writ alleges the custom in the parish to be in accordance with canon 89, that is, that the minister and churchwardens are to elect the two churchwardens jointly, but if they cannot agree each is to nominate one. The return admits this, but puts forward (par. 1 & 2) that the incumbent was first appointed after the dissolution of monasteries, and that the incumbent is consequently only a perpetual curate, and not a vicar (except for the purpose of style under 31 & 32 Vict. c. 117, s. 2). This therefore raises the first and principal question, whether a perpetual curate is within the canon which is thus described in 1 Burn's Ecc. Law, p. 401, "Can. 89: All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such choice, then the minister shall choose one and the parishioners another; and without such a joint or several choice none shall take upon them to be churchwardens." Burn goes on: "The books of common law interpret this with a limitation, namely, if a custom hath not been for the parishioners to choose both." And there is, as already pointed out, no such custom set up here. There is nothing said in the canon as to rector or vicar, simply minister; and for all ecclesiastical purposes the perpetual curate is as much minister as the others. In *Catten* v. *Barwick* (1), and *Hubbard* v. *Penrice* (2), it

(1) 1 Str. 145. (2) 2 Str. 1246.

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was held that of common right the election of churchwardens was in the minister and parishioners; and in this latter case Lee, C. J., held that a curate stood in the place of the parson for the purpose. The vicar is no more an immemorial officer than a perpetual curate. Vicars were first introduced by 15 Ric. 2, c. 6, and were made perpetual by 4 Hen. 4, c. 12. The second ground of the return (par. 3) is displaced by the fifth plea, which shews that the parishioners wholly denied the right of the incumbent to any voice in the choice; it was therefore unnecessary that he should go through the form of presenting his nominee to them for their consent. Lastly (par. 5), the fact that the defendant churchwardens are now out of office is no answer to the prosecutor's right to judgment; they might have obeyed the writ, which was issued while they were in office.

Merewether, for the defendants. In all the reported cases the incumbent was either rector or vicar. There is no case to shew that the custom extends to perpetual curates. The dictum of *Lee*, C.J., is said to be founded on *Grove* v. *Elliot* (1) which has no bearing on this point. In the absence therefore of all authority the custom cannot be taken to extend to perpetual curates; and the election of both churchwardens must be in the parishioners; and consequently the first ground of the return is good.

[QUAIN, J. Blackstone, in 1 Com. 387–8, refers to the statutes 15 Ric. 2, c. 6, and 4 Hen. 4, c. 12, under which there ought to have been vicars perpetual in all appropriations of churches; and he points out that a vicar is in effect a perpetual curate only with a standing salary.]

Secondly, assuming the canon and custom to apply to a perpetual curate, in the present case the perpetual curate did not attempt to appoint jointly with the parishioners; consequently they had a right to appoint both churchwardens. Thirdly, the defendant churchwardens are now out of office, and a mandamus cannot be granted to compel them to perform what they are unable to perform: *Reg.* v. *D'Oyly*. (2)

[BLACKBURN, J., referred to *Reg.* v. *Rochester*. (3)]

That case is distinguishable; there the mayor was still in office,

(1) 2 Vent. 41. (2) 12 A. & E. 139.

(3) 7 E. & B. 910; 27 L. J. (Q.B.) 45.

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and therefore could do the act, although not at the proper time.

Charles was not called upon to reply.

COCKBURN, C.J. I am of opinion that the prosecutor is entitled to judgment. The question here is, whether the general custom in accordance with the 89th canon, which, in the absence of evidence to the contrary, is taken to govern the election of churchwardens, applies in a case of this kind, where, on the dissolution of the monastery, a perpetual curate was first appointed as the permanent minister of the parish. The return does not allege the existence of any other custom; it only says that two churchwardens ought to be elected at the vestry assembled for the purpose, but it does not go on to say that the parishioners are entitled to elect both. Now before the surrender of the monastery some person in holy orders must have been appointed by or on behalf of the ecclesiastical body to celebrate divine service and to represent them as minister in spiritual matters, as well as to take care of the church property. And it must be taken, in the absence of evidence of a custom to the contrary, that he took the usual part of the minister in the management of the ecclesiastical affairs of the parish; and so the custom as to the choice of churchwardens would be applicable to the case. This monastery had never appointed a vicar, but from time to time appointed one of their body to minister in ecclesiastical matters; but whoever was thus delegated to minister and to discharge the religious offices would naturally have assisted in the administration of the parish affairs, and he must be assumed to have taken the usual part in the election of churchwardens as necessary to the due administration of the ecclesiastical law. And when, on the dissolution of the monastery, the old state of things was changed, and the perpetual curate was appointed instead of the old temporary minister, the general custom as to the minister's part in ecclesiastical matters must attach to the new state of things. The perpetual curate is the minister, having as to ecclesiastical matters the same functions as a rector, or parson, or vicar; and he is not the mere representative of the parson, as a curate would be; but he is the minister, and has the spiritual government of the parish. In the present case, therefore, it is

quite unnecessary to adopt the dictum of the Chief Justice in *Hubbard* v. *Penrice* (1), that the curate is in the place of the parson, and substituted for him for this purpose. That is not before us; here the perpetual curate is himself the incumbent or minister, and as such endowed with the spiritual functions. Therefore I think the case falls within the general law; and as no custom contrary to the 89th canon is set up, the general law must prevail, and the right of election was, as alleged, in the perpetual curate and parishioners.

BLACKBURN, J. There can be no doubt of the accuracy of what Lord Hardwicke said in *Middleton* v. *Crofts* (2), that the canons do not of themselves bind the laity, but that there are many of them which are declaratory of the ancient usage and law of the church, and are so far received and allowed. In the present case the usage alleged by the writ to exist in this parish is in strict accordance with the 89th canon; and it is perfectly well established that this mode of choosing churchwardens must prevail in the absence of proof of any other custom. And indeed it has hardly been disputed that this custom in general, so far as it relates to rectors and vicars, is valid; and this can only be because the rule of the canon law had been adopted by our law, and the minister does as of common right take part in the choice of churchwardens. But it was argued by the defendants' counsel that a perpetual curate is not a minister within the canon. The word minister is quite general, and can only mean the person having the cure of souls in the parish. Rectors may have been from time immemorial, but most, if not all, vicars are not immemorial, and were appointed under more recent statutes which also made them perpetual. There is nothing in the statutes which says that the vicars shall appoint one of the churchwardens, and consequently it can only have been as minister that the vicar acquired this right. It was urged that the priory, being the impropriators, did not appoint a vicar, but discharged the duty by one of their own body from time to time appointed for the purpose of administering the ecclesiastical affairs of the parish. If so, the monk, though only

(1) 2 Str. 1246.

(2) 2 Atk. at pp. 653, 669. See also *Bishop of Exeter* v. *Marshall*, Law Rep. 3 H. L. 17.

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temporarily appointed, would be for the time being the minister; and when, on the surrender of the monastery, the lay impropriator became obliged to appoint a perpetual curate, I see no difficulty in holding that the curate would have the right to appoint one of the churchwardens in conformity with the 89th canon. It is very true that the want of a permanent vicar might have given rise to the custom of the parishioners appointing the two churchwardens; and perhaps this would have been the more likely when the impropriators did not appoint a vicar. But upon this record no such custom is attempted to be set up, the custom as alleged in the writ is admitted, and the only question raised is, whether a perpetual curate can be a minister within the custom. I think it clear that he can.

The other points raised for the defendants also fail. The fifth plea is good; it was unnecessary for the minister to go through the form of proposing his churchwarden to the parishioners when they had all along denied his right to interfere. And the third ground of the return is no answer; the defendants might have obeyed the writ while in office; and though it may be a very good reason for not proceeding against them for disobedience that the churchwardens are now out of office, it is no reason why the writ should not go so as to entitle the prosecutor to his costs.

QUAIN, J. I am of the same opinion. In the absence of a custom to the contrary, the minister appoints jointly with the parishioners in accordance with the 89th canon; and I think it clear that a perpetual curate is a minister within that; he is practically and to all intents and purposes just as much incumbent as a vicar. I may observe that by the 58 Geo. 3, c. 69, s. 2, which regulates the holding of vestries, the incumbent, if present, is to preside, and a perpetual curate is expressly mentioned along with rector and vicar; and this to some extent confirms the view we take.

Judgment for the Crown.

Attorneys for prosecutor: *Brooks & Co.*
Attorneys for defendants: *Field, Roscoe, & Co.*

END OF MICHAELMAS TERM, 1872.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXVI VICTORIA

MILES *v.* FURBER AND OTHERS. 1873 *Jan.* 17.

Landlord and Tenant—Distress for Rent—Privileged Goods—Goods deposited at a Depository Warehouse to be taken care of—Estoppel.

The plaintiff deposited household furniture at a depository to be warehoused at the rate of 30*s.* a year. At the time he thought he was depositing them with a company with whom he had had dealings before; and he received a receipt in the name of the company, which name was also over the door of the depository. The fact was that the company had sold their business to B., and let the premises to him, but they had authorized the use of their name. B. being in arrears for rent, the defendants seized and sold the plaintiff's goods under a warrant of distress from two of the directors of the company; on which plaintiff brought an action against defendants:—

Held, that the case fell within the principle of *Swire* v. *Leach* (18 C. B. (N.S.) 479; 34 L. J. (C.P.) 150); and that the goods were privileged from distress, as things delivered to a person exercising a public trade to be managed in the way of his trade.

Held also, that the company were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited.

CASE stated under an order of Nisi Prius.

Declaration for seizing and converting goods of plaintiff.

Case 11 Jan H.S. 179

1873

MILES v. FURBER.

Plea: not guilty by statute (11 Geo. 2, c. 19, ss. 19 and 20) justifying under a distress for rent.

Issue joined.

1. The plaintiff on the 20th of October, 1869, deposited various articles of household furniture at a depository for furniture, situate at 277, Gray's Inn Road, London, and received the following receipt: "London Depository Company Limited, Gray's Inn Road, King's Cross, Oct. 20th, 1869.

"Received from Mr. Miles, furniture and goods as per inventory, No. 134, terms 30*s.* per year. To be warehoused subject to the conditions endorsed hereon. For the London Depository Company Limited. J. L. FOSTER, for Manager."

2. Before the month of May 1863, one Stuckley was the occupier of the premises 277, Gray's Inn Road, and used them as a depository for furniture under the name of the North London Depository.

3. In May 1863, a joint stock company was formed for the purpose of purchasing and did afterwards purchase Stuckley's interest in the premises, and the goodwill of his business, and the company was incorporated under the name of the London General Depository Company Limited. The registered office of the company was painted conspicuously on the premises. The company carried on the business until July 1866.

4 & 5. In the year 1865, a Mr. Beeston, who had previously acted as secretary of the company, entered into negociations for a lease of the premises 277, Gray's Inn Road, from the company, and a transfer of their business, and his proposal was submitted to the shareholders. It was found upon examining the articles of association that the company had no power to transfer the premises or the business, and in order to get over the difficulty, it was agreed among the shareholders that the company should be dissolved, and a new company to be called "The London Depository Company, Limited," should be formed with articles of association containing the necessary powers.

6–8. The new company was incorporated in July 1866, and the old company was shortly afterwards dissolved. The new company carried on the business until the arrangements with Beeston were completed in April, 1867. Their name was painted conspicu-

ously upon the premises 277, Gray's Inn Road, where the name of the old company had previously appeared. In April, 1867, the arrangements with Beeston were carried out by two deeds of the 8th of April, 1867. By one deed the company granted an underlease of the premises 277, Gray's Inn Road, to Beeston for sixty years, at a yearly rent, payable quarterly. By the other deed the company assigned to Beeston all their goodwill in the business, with full power and liberty to Beeston to carry on the business in the name of the company, and further transferred to him all their book debts, and all their subsisting contracts, and all other the property in and about the premises, and used by them in carrying on their business. The deed contained a covenant from Beeston to indemnify the company from all claims and demands arising from the business being carried on in the company's name.

9. After the 8th of April, 1867, the London Depository Company, Limited, ceased to carry on the business, and the same was carried on for his own benefit by Beeston. The company, however, had their registered office at 277, Gray's Inn Road, and their name continued upon the premises down to about the month of July 1869. Meetings of the directors were from time to time held at their registered office.

10 & 11. In July 1869, Beeston went into partnership with a man named Robinson, a coachbuilder, and the business was carried on upon part of the premises, 277, Gray's Inn Road. A large number of carriages was placed on the premises for sale. The business of a furniture depository continued to be carried on as before. When this new partnership was formed Beeston took down the board on which the name of the company had been painted, and painted on the front of the building the name, "The London Carriage Bazaar." Shortly after, the directors of the company discovered that the name of the company had been removed, and being afraid of incurring penalties if their title did not appear at their registered office, required Beeston to replace it. Beeston had the name of the company painted over one of the doorways where it was clearly visible, though it was not conspicuous.

12. When the plaintiff deposited the goods at 277, Gray's Inn Road, in October 1869, and obtained the receipt mentioned in paragraph 1, he was not aware either that a new company had

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been formed, or that Beeston was their tenant, or that the business was being carried on by Beeston. He believed that he was dealing with the company which had been formed in 1863, with which he had had previous transactions; and his attention was not called to the alteration in the name by the omission of the "General." Foster who signed the deposit receipt was a servant of Beeston's, and was not in the employ of the company. The company at the time when the receipt was given had no manager.

13. The goods deposited by the plaintiff were placed in a separate room or compartment, on which was fixed a label bearing the plaintiff's name, and so remained until they were removed and sold by the defendants under the distress for rent.

14 & 15. On the 7th of January, 1870, the sum of 1100*l.* for rent was due from Beeston to the company, and at a meeting of the directors of the company, held on the 8th of February, 1870, it was resolved that a distress should be levied upon the goods on the premises for the arrears, and accordingly a distress warrant was issued signed by two of the directors. The warrant was placed in the hands of the defendants, who accordingly distrained upon all the goods on the premises, and afterwards sold the plaintiff's goods.

16. It is agreed that the Court shall be at liberty to draw any inferences, or find any facts which in the opinion of the Court a jury ought to have drawn or found.

The question for the Court was whether the defendants are liable in this action.

Joyce, for the plaintiff. First, the plaintiff's goods, being deposited in a warehouse kept for the purpose, were not distrainable, within the principle of the cases of *Swire* v. *Leach* (1) and *Adams* v. *Grane* (2), in which goods pledged with a pawnbroker, and goods deposited with an auctioneer for sale were held not distrainable, as things delivered to a person exercising a public trade to be managed in the way of his trade. Erle, C.J., in the former case classes the pawnbroker with the wharfinger, and a warehouseman is still nearer.

[MELLOR, J. On the other hand, a horse and carriage standing at livery have been held not privileged from distress].

(1) 18 C. B. (N.S.) 479; 34 L. J. (C.P.) 150. (2) 1 Cr. & M. 380.

11 Jur. N.S. 179.

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Secondly, even if the goods were not privileged, the company were estopped from distraining as landlords, having held themselves out as the persons with whom the goods were deposited.

H. James, Q.C. (*Francis* with him), for the defendants, was directed by the Court to argue the first point. These goods were not within any of the exemptions from the general rule that goods found on the premises are liable to be distrained: *Parsons* v. *Gingell* (1) is the case to which Mellor, J., referred, as deciding that a horse at livery was distrainable. In that case Wilde, C.J., says: "The question in all these cases is whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with the view of having labour or skill bestowed upon them;—which is the principal object, and which incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class; but if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration." The Chief Justice, after saying that the question was under which class a horse at livery falls, proceeds: "The general principle of law undoubtedly is, that all goods found upon the premises are liable to be distrained for rent. Upon that general rule two exceptions only are engrafted. The first is, when the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and it is to be returned to the owner as soon as that purpose has been accomplished." He then gives instances of the horse sent to the farrier, cloth to the tailor: "The second exception is, where the goods are sent to the party's premises in the way of his trade, for the purpose of sale. It appears to me that all the cases cited, that profess to range themselves under this head, strictly do so. Upon what precise ground the privilege of goods at a wharfinger's rests, does not very distinctly appear. I incline to think it arose from the circumstance of their having in former times existed only certain wharves, at which all persons were obliged to land their

(1) 4 C. B. 545, 558; 16 L. J. (C.P.) 227.

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goods, and at which it does not appear that goods were landed for any other purpose than that of sale." It appears from this case, therefore, that the only privileged goods are goods left to have labour bestowed upon them, or for the purpose of sale.

[COCKBURN, C.J. That is inconsistent with the later case in the same court, which I prefer to follow, and the present case appears to come within the principle of that decision.]

Swire v. *Leach* (1) carries the principle of exemption from distress far beyond the previous cases. Thus cattle taken in to agist have been held not privileged.

On the second point it is difficult to say that the defendants are not estopped by their conduct.

COCKBURN, C.J. The principle which is applicable to a pawnbroker's business seems to me to be applicable to this case; if the goods deposited were liable to be distrained, it would affect the very existence of the business. I am inclined to think that the case of horses and carriage at livery must be taken as trenching upon this principle. At all events, if the two cases in the Court of Common Pleas are not reconcilable, I prefer to abide by the later case, *Swire* v. *Leach* (1), the principle of which, as I have already said, seems precisely applicable to the present case. I also think that the company were estopped, they having allowed themselves to be held out as the persons with whom the goods were deposited.

MELLOR, J. I am of the same opinion. When goods are received in the course of a particular trade, to be dealt with in accordance with that trade by a tenant of premises, there are cases to shew that the landlord cannot distrain upon the goods. Though there are cases somewhat to the contrary, such as that of a horse and carriage at livery. Whether or not any distinction can be drawn between that case and the case of a pawnbroker, we have a later case in the same Court as an authority that pledges are privileged from distress, and the same principle applies here. There is also the old case in which it is said that cattle taken in to

(1) 18 C.B. (N.S.) 479; 34 L. J. (C.P.) 150.

agist are distrainable. (1) I cannot help thinking that if it were shewn that a person exercised the trade of agisting cattle, the same principle would apply as in the case of a pawnbroker. I also think, on the other ground, that the plaintiff is entitled to judgment.

ARCHIBALD, J. The principle, on which exceptions in the case of certain trades have been engrafted on the general liability of goods to be distrained for rent when found on the demised premises, appears to be, that the trade or business could not be carried on, except the goods were privileged from distress. Thus, goods left with a carrier to be carried or pledged with a pawnbroker are privileged; and goods which are received to be taken care of and warehoused seem to come entirely within the same principle. The law of distress by which one man's goods are made to pay for another man's debts, is not one which should be carried beyond the limits to which it has already been confined, and I think we ought to give effect to the principle of the decision in *Swire* v. *Leach* (2).

Judgment for the plaintiff.

Attorney for plaintiff: *J. Jones.*
Attorneys for defendants: *Monckton & Co.*

(1) See Rolle Ab. Distress (I), pl. 22, 23; translated in Viner Ab. under the same title, &c. See also *Fowkes* v. *Joyce* (2 Vent. 50; 3 Lev. 260; and 2 Vern. 129.)

(2) 18 C. B. (N.S.) 479; 34 L. J. (C.P.) 150. See also the judgments in *Thompson* v. *Mashiter* (1 Bing. 285).

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Jan. 20.

NOLAN *v.* COPEMAN.

Costs, Taxation of, between Party and Party—Expenses of Witness qualifying himself to give Evidence—Costs of Inspection of Defendant's Books by Accountant on behalf of Plaintiff.

An action involving long accounts between plaintiff and defendant was referred; and it was ordered that plaintiff, by an accountant to be named by the arbitrator, should have inspection of, and take extracts from, defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in plaintiff's favour, with the costs of the action, reference, and award. On taxation:—

Held, that the case came within the ordinary rule; and that plaintiff was not entitled to the costs of the preliminary examination of the books by the accountant.

Rule calling on the defendant to shew cause why the Master should not review his taxation.

The action was brought to recover the difference between the actual proceeds of sales of butter consigned by plaintiff from Ireland to defendant for sale on commission in Manchester, Liverpool, and London, and the amounts at which such sales were returned as sold in the accounts rendered by defendant to plaintiff. The transactions were very numerous, and extended over five years.

The cause was referred to an accountant.

Before the order of reference was drawn up, a summons for inspection was heard, when the defendant objected to submit his books to the inspection of a person employed by the plaintiff; and an order was made by Hannen, J., that the plaintiff should have inspection of, and take extracts from, the defendant's books by an accountant to be named by the arbitrator. The arbitrator named an accountant accordingly, and he and his clerks were occupied fifty-one days in examining and taking extracts from the books. He was afterwards examined on two days before the arbitrator. His charge for examining the books and giving evidence was 114*l.*

The arbitrator awarded to the plaintiff 297*l.*, with all his costs of the action, reference, and award.

The arbitrator made affidavit that the preliminary examination

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of the books by the accountant had saved a great deal of time, which must otherwise have been occupied before the arbitrator in going through the books.

On taxation the master allowed 4*l.* 14*s.* for the two days' attendance and expenses of the accountant as a witness, but he disallowed the accountant's charges for the preliminary examination.

On appeal to Lush, J., he declined to disturb the taxation, but thought it a case for the Court.

Waddy shewed cause. This was the ordinary order for inspection, the costs of which are never allowed between party and party. The fact that the person making the inspection was to be named by the arbitrator does not make the inspection less that of the plaintiff. Nor can the costs be allowed as the costs of the witness. The case falls within the ordinary rule that the costs of the witness in preparing himself to give evidence are not allowed on taxation.

Ambrose, in support of the rule. It must be admitted, that if this were an ordinary order of inspection, as the order is silent as to the costs, they could not be allowed; this was held in *Smith* v. *Great Western Ry. Co.* (1). But this was not an ordinary order. The accountant was to be named by the arbitrator; and there can be no doubt that the labour of the accountant, as the arbitrator has found, shortened the inquiry very much, and so saved expense. Again, it must be conceded that the expenses of a witness qualifying himself to give evidence falls within the head of preliminary expenses, which the party calling him must bear. But this is not the ordinary case of a witness qualifying himself. It is, in fact, putting the evidence itself into shape; it is enabling the books themselves to be given in evidence. In 2 Lush's Practice, p. 894, it is said, subject to certain statutes, "the party succeeding in the action is entitled to recover, not merely the costs of the suit or pleadings, but all the costs which he has necessarily incurred in prosecuting so much of the claim or defence on which he has succeeded. . . . In taxing these costs much is left to the discretion of the master. Thus he will determine what number of witnesses is proper to be allowed upon the same matter. . . . But

(1) 6 E. & B. 405; 25 L. J. (Q.B.) 279.

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the costs of what may be called speculative searches after evidence will not be allowed. Such costs are not, properly speaking, costs in the cause, but expenses incurred by a person whose position is called in question for the purpose of ascertaining what that position is. But the costs of searching for and translating ancient records have been allowed;"—for this is cited *Beaufort* v. *Ashburnham* (1);—"for they are only the costs of bringing existing evidence into shape. So also the costs of maps or models used at the trial may be allowed, if it appear that they were proper for the better elucidating of the case." The case falls directly within *Beaufort* v. *Ashburnham.* (1) In *Daniel* v. *Wilkin* (2) even the costs of search for evidence were allowed. *Hawkins* v. *Rigby* (3) is in point. There the accountant was appointed by the arbitrator to examine the defendant's books and the accountant's charges were allowed to the plaintiff on taxation.

[BLACKBURN, J., referred to *May* v. *Selby.* (4)]

COCKBURN, C.J. I am of opinion that this rule must be discharged. It would have been a very different question, if the whole matter were open, and there were no rule as to these preliminary expenses, and it may well be questioned whether it would not have been better that it should be left to the master's discretion to allow or disallow these expenses, according to circumstances. But there is an inflexible rule that the preliminary expenses of what has been called qualifying the witness to give evidence shall not be allowed. Here the application for inspection was made on behalf of the plaintiff, and under ordinary circumstances the costs of such inspection are not allowed to the successful party; and in what respect did the present order differ from the ordinary order for inspection, except in one immaterial circumstance? The plaintiff desired inspection of the defendant's books, to which he was clearly entitled, but the defendant objected to his books being submitted to a person altogether in the plaintiff's interest, and a species of compromise was come to, by which the plaintiff was to have inspection, but by some independent person

(1) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97.
(2) 8 Ex. 156; 22 L. J. (Ex.) 73.
(3) 8 C. B. (N.S.) 271; 29 L. J. (C.P.) 228.
(4) 4 M. & G. 142.

to be named by the arbitrator; but the inspection was not on that account the less the inspection by or on behalf of the plaintiff; and the same principle applies as if the inspection had been in the ordinary way by an agent of the plaintiff.

BLACKBURN, J. I am of the same opinion. I am far from saying that these costs might not have been properly treated as the costs of the plaintiff proving his case; and that it might not have been better that it should have been a condition of the order that the costs of inspection should be costs in the cause, so that the plaintiff should have them if he succeeded, or, if he failed, then the defendant would have them. But there was no such provision in the order. The inspection of the books was by an accountant employed by the plaintiff, and the fact that he was to be named by the arbitrator, as the Chief Justice has pointed out, made no difference. The case, therefore, falls within the ordinary rule that the costs of a witness qualifying himself to give evidence are not allowed on the taxation of the costs of the party calling him. The only case cited by the plaintiff's counsel which makes at all in his favour is *Beaufort* v. *Ashburnham* (1); but that appears to be an anomalous case, nor do I understand from the report what were the reasons on which the Court acted in allowing the costs of the search for evidence.

MELLOR and LUSH, JJ., concurred.

Rule discharged.

Attorney for plaintiff: *E. Worthington, for Sale, Shipman, & Seddon, Manchester.*

Attorney for defendant: *J. Crowdy.*

(1) 13 C. B. (N.S.) 598; 32 L. J. (C.P.) 97.

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Jan. 25.

STEWART AND OTHERS *v.* THE WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

Ship and Shipping—General Average—Loss to Cargo by Water let into Ship to extinguish Fire—Custom—Bill of Lading.

Plaintiff shipped bark on board defendants' general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, and pumping water through the deck of the forecastle not being sufficient to extinguish the fire, a hole was cut in the side of the ship, and, her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The plaintiff's bark was destroyed by the water poured into the ship.

In an action for general average contribution in respect of the destruction of the plaintiff's bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss :—

Held, that the loss was, according to the general law of England, the subject of general average contribution, as a voluntary and intentional sacrifice of the bark made under pressure of imminent danger, and for the benefit and with the view to secure the safety of the whole adventure then at risk.

But, secondly, that the plaintiff, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract; and he was bound by it, although erroneous.

Affirmed in Exch. post 362.

CASE stated without pleadings.

1. The action was brought in respect of the loss of bark shipped on board the defendants' steamship *Venezuelan*, and consigned to the plaintiffs.

2. The *Venezuelan* came to an anchor in the port of Santa Martha on the 16th of October, 1871; and after discharging all her cargo for that port, took on board a general cargo of produce and merchandize for Savanilla, Colon, London, and Liverpool.

3. This general cargo consisted of goods shipped by various persons, and amongst these goods were 180 serons of bark, which were shipped on behalf of the plaintiffs for carriage to London under two bills of lading, which were in the same terms. The following are the material parts :—"Shipped in good order and condition, by M. Ide Mier of Santa Martha, in and upon the good steamship the *Venezuelan* . . . now lying in or off the port of

Santa Martha, 100 serons bark covered by consignees' open policy of insurance, to be delivered in the like good order and condition, subject to the terms and conditions stated in this bill of lading, which constitute the contract between the shippers and the company, unto Messieurs Barbour (the plaintiffs' firm), or their assigns, at the port of London . . . the port of destination of the goods; average, if any, to be adjusted according to British custom. . . . The company is not liable for any loss or detention of, or damage or injury to the goods, or the consequences thereof, occasioned by any or several of the following causes, viz., the act of God, enemies, pirates, theft on land or afloat, vermin, barratry of master or mariners, restraint of princes, rulers, or people, fire on board, in hulk or in craft or on shore, or waggons, stranding, collisions, explosions, or straining, perils of the seas, rivers, navigation, land transit, lighterage, storage afloat or ashore, interruption to navigation by ice, transhipments, any act, neglect, or default of the pilot, master, mariners, engineers, servants, or agents of the company."

4. While the *Venezuelan* was at Santa Martha, loaded and about to sail, a fire broke out, at about 11 P.M. of the 18th of October, in the forehold. Every effort was at once made to extinguish the fire, by playing water down the hatchways by means of the fire-hose, and by cutting holes in the forecastle deck and pouring water down on the cargo stowed in the forehold. This was continued to be done until about 4 A.M. of the next day, when the men at work near the forehold were driven out by the heat and smoke. The steamship was then turned round, stern on to the wind, to keep the fire forward, and portions of the cargo stowed in the afterholds of the vessel were discharged into lighters. The fire hose was kept continually playing down the forehatch and the forecastle skylights, but it did not subdue the flames, and at about 8 A.M. the fire reached the upper deck. A hole was then cut in the side of the vessel, and her fore-compartment was thereby filled with water. By this means the crew ultimately succeeded in extinguishing the fire. If this had not been done the remaining cargo would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck.

5. The whole of the contents of the forehold were entirely destroyed by fire, and a great part of the cargo stowed in the

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adjoining holds was damaged or destroyed by the water which was poured or let into the vessel in order to extinguish the fire.

6. It is admitted, for the purposes of this case, that 152 of the 180 serons of bark, shipped on behalf of the plaintiffs, were destroyed by the water poured or let into the said steamship in the manner above described.

7. It has been the practice of British average adjusters, in adjusting losses, to treat a loss occasioned by water in the manner above described as not a general average loss.

8. The *Venezuelan*, after discharging and reloading cargo and undergoing temporary repairs at Santa Martha, subsequently proceeded on her voyage, and delivered the various portions of the cargo to the respective owners or consignees thereof.

9. The Court was to be at liberty to draw such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the Court was, whether the plaintiffs are entitled to recover from the defendants any sum of money, by way of general average contribution or otherwise, in respect of the aforementioned loss of the 152 serons of bark.

Nov. 8, 1872. *Butt, Q.C.* (*Cohen* with him), for the plaintiffs. First, the loss of the bark under the circumstances described was clearly a general average loss. Any voluntary sacrifice of part of the adventure, or voluntary subjecting of part to increased risk for the general good, constitutes the subject of general average. In Benecke, Pr. of Indem., p. 243, this precise case is considered, in the author's opinion, to be general average, although the practice of British average adjusters is to the contrary. He says: "If water were thrown down the hatches to stop the progress of an accidental fire in the hold or between the decks, this must be conceived to be done with the double intention of saving the article which has already caught fire from utter destruction, and of extricating the vessel and the rest of the cargo from an imminent danger. The effect of the water on the former goods is, therefore, particular average; it is not an injury, but a real advantage done them. But the damage done by the water to other goods is, I conceive, of the nature of general average, upon the same principle on which occasional damage done to goods during

jettison is considered as such." Again, in Baily on General Average, c. 3, r. 10, p. 40 (2nd ed.), it is said: "Damage done to cargo by pouring water down upon it, in order to extinguish a fire which has not touched the goods injured by the water, is excluded from general average. The principle upon which this rule is based is erroneous, as was stated above (p. 11, note); and the rule is clearly inequitable." The author refers in similar language to the practice at pp. 81, 82. [See the judgment, post, p. 94] The principle of the disallowance seems to be that it is a moral certainty that the fire would consume the cargo if it be not extinguished by throwing water on the cargo, and so the cargo is in no worse position, although the rest of the adventure be saved by the operation. There is no English case directly in point; but *Johnson* v. *Chapman* (1), may be referred to for the principle. There are, however, two American cases in point: *The Brig Mary* (2) and *Nimick* v. *Holmes* (3); the latter is precisely this case. There, after discussing the principles applicable to general average and the instances given, the Court comes to the conclusion that the loss so occasioned is general average. [He read the passage given, post, p. 94, in the judgment of the Court.] In 2 Arnould, Ins. pp. 769, 770 (4th ed.), instances of general average loss are given, and among them the present: "So when water is thrown down a ship's hatches to extinguish an accidental fire, and other goods are damaged thereby." The opinion of Stevens, On Average, pp. 41, 42 (5th ed.), is to the same effect. Secondly, it will be said that the plaintiffs are precluded by the clause in the bill of lading, "average, if any, to be adjusted according to British custom;" but this refers to the mode of statement as to the proportion to which cargo and ship are to contribute, which varies in different countries, and ought not to be taken to refer to a custom erroneous in law, as distinguished from law; it in effect says the statement shall be made and the contribution calculated according to the British law.

[QUAIN, J. This was a bill of lading to London; that, being the port of destination, would be the port of adjustment, and therefore in the view suggested that clause would have no meaning.]

(1) 19 C. B. (N.S.) 563; 35 L. J. (C.P.) 23.

(2) 1 Sprague's Decisions, 17.

(3) 25 Pennsylv. Rep. 366, 373.

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The ship was going to Colon, and the same form of bill of lading is used. Moreover, the adventure might have been broken up at an intervening port, in which case, as pointed out in 2 Arnould on Ins. p. 812 (4th ed.), that port becomes in effect the port of discharge and the place of adjusting the general average. See also to the same effect 1 Parsons on Shipping, b. 1, c. 9, s. 21, p. 465. The clause cannot mean that the average adjuster is to determine conclusively what is and what is not general average. At all events, not if the custom is invalid according to the general law.

[COCKBURN, C.J. If the parties select the practice of a particular country as to adjustment, why are they not to be bound by it? Although contrary to law, there is nothing illegal in it.]

Sir G. Honyman, Q.C. (*R. G. Williams* with him), for the defendants. The plaintiffs are concluded by the bill of lading; they have agreed to be bound by the British practice as to average; the words are not "general average," but "average," i.e., loss, to be adjusted according to British custom, and it is immaterial whether it is a valid custom; if it is not illegal, they are bound by it. It is clear that is what is meant. The first thing an average adjuster does when the papers are laid before him is to determine what is general and what is particular average. And as "there is a great diversity in the practice of different countries with regard to what shall or shall not be included in general average," 2 Arnould, Ins. p. 813 (4th ed.), this clause was inserted. It is admitted in the case that this was not general average according to the British practice; and in addition to the authorities cited, Hopkins on Average may be cited to the same effect (pp. 59, 60, 3rd ed.), and while saying the practice is not to be defended on principle, he says it may be on the ground of expediency. Whatever may be the practice of average staters of the particular country, if the parties have agreed to it, they are bound by it: *Harris* v. *Scaramanga.* (1)

Butt, Q.C., in reply. The bill of lading uses the word "custom," not "practice;" custom must mean a valid custom, as in accordance with the general law of the land.

[QUAIN, J., referred to *Miller* v. *Tetherington.* (2)]

Cur. adv. vult.

(1) Law Rep. 7 C. P. 481.
(2) 6 H. & N. 278; 30 L. J. (Ex.) 217; 7 H. & N. 954; 31 L. J. (Ex.) 363.

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Jan. 25. The judgment of the Court (Cockburn, C.J., Mellor, and Quain, JJ.), was delivered by

QUAIN, J. This is an action brought by the plaintiffs as the owners of 152 serons of bark, shipped on board one of the vessels of the defendants, to recover a general average contribution in respect of the loss of the bark on a voyage from Santa Martha to England.

The first question argued before us was, whether the loss in question was a loss which properly formed the subject of a general average contribution, according to the law of England.

The manner in which the loss was occasioned is described in the 4th, 5th, and 6th paragraphs of the special case. It appears that while the ship was lying at Santa Martha, and just when she was about to sail, a fire broke out in the forehold. Every effort was made to extinguish it by playing water down the hatchways, and through holes cut in the forecastle deck. This not being sufficient to subdue the fire, a hole was cut in the side of the ship and her fore-compartment was thereby filled with water. In this manner the fire was extinguished; and it is found and admitted in paragraph 4, that if that course had not been taken the remaining cargo (a portion having been discharged into lighters) would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. It is admitted in paragraph 6 that the plaintiff's bark was destroyed by the water poured or let into the ship in the manner described in order to extinguish the fire.

On these facts we are clearly of opinion that the loss was, according to the general law, properly the subject of a general average contribution. It was a voluntary and intentional sacrifice of the bark made under the pressure of imminent danger, and for the benefit and with a view to secure the safety of the whole adventure then at risk. No case has been cited in which the exact point to be decided has arisen in our courts; but we have been referred to an American case in which the question was considered and decided.

That case is *Nimick* v. *Holmes* (1), decided in the Supreme

(1) 25 Pennsylv. Rep. 366, 373.

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STEWART v. WEST INDIA AND PACIFIC STEAMSHIP CO.

Court of Pennsylvania. There Lowrie, J., in delivering the judgment of the Court says, "Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, by the aid of fire-engines on the land, or in the form of steam, or by the scuttling the vessel. . . . It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest."

We quite agree with this conclusion; and, if the present case depended wholly on the common law applicable to general average losses, we think the plaintiffs would be entitled to recover.

But it is contended for the defendants that the general law, as we have just expounded it, is excluded in this case by the express terms of the bill of lading, which contains these words:—"Average, if any, to be adjusted according to British custom," inasmuch as "British custom" can only mean the practice of British average adjusters; and it is admitted in paragraph 7 of the case, to be the practice of British average adjusters to treat a loss occasioned by water in the manner above described as not a general average loss.

It appears from the works of Mr. Stevens (1) and Mr. Baily, that the practice as stated in paragraph 7 does prevail among the British average adjusters, though it is condemned by both writers as unjust. "The damage done to cargo," says Mr. Baily (2), "by pouring water upon it to extinguish a fire, or by water admitted into a vessel's hold when she is scuttled to extinguish a fire, is excluded from general average. In defence of this practice no valid reason can be urged. It is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in the case of fire and the degree existing when a vessel is on her beam

(1) Stevens on Average, p. 41, 5th ed.
(2) Baily on General Average, pp. 81, 82, 2nd ed.

ends, or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense."

The question in this case, however, is whether the parties have not, by the words used in the bill of lading, made this practice a part of their contract, for, if so, they are bound by it, though the practice may be, according to the best opinion, vicious and unreasonable.

On the other hand it is argued for the plaintiffs that it was not intended, by the expression used in the bill of lading, to draw any distinction between British law and British custom, and that the words were inserted solely in order to prevent the average being adjusted by different laws, according to the different ports of destination at which the ship stopped in the course of her voyage.

But we are only entitled to infer the meaning of the parties from the language which they have used; and as it appears on the face of the case, and also from the authorities above cited, that a practice prevails among British average adjusters not to allow a loss like the present as a general average loss, we can only construe the expression "British custom" as intended to apply to that practice, as the mode of adjusting the average by which the parties have agreed to be bound.

It follows, therefore, that, as the parties have agreed to make this custom a part of their contract, the case must be decided in accordance with the custom, and the result is that our judgment must be for the defendants.

It is to be hoped, however, that in future there will be no difference between law and custom on this point, and that average adjusters will act on the law as now declared, and that bills of lading will also be framed in accordance with it.

Judgment for the defendants.

Attorneys for plaintiffs: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Chester and Urquhart, for Haigh & Co., Liverpool.*

1873
Jan. 21.

ARNOLD *v.* HOLBROOK.

Highway—Limited Dedication—Right of Public to Deviate.

The plaintiff was the occupier of an arable field, across which was a public footpath, but the plaintiff and his predecessors had the right to plough up the footpath when ploughing the field. The public, when the way was muddy after being ploughed up, having deviated on to the plaintiff's field, the plaintiff, in order to prevent them from straying from the line of footpath, placed hurdles on the sides of it, some of which were thrown down by the defendant:—

Held, that the footpath having been dedicated to the public, with a reservation of the right to plough it up, on its becoming impassable after being ploughed up the public had no right, in the absence of evidence of such a prescriptive right, to pass over the adjoining parts of the plaintiff's field; and that the defendant was liable in an action of trespass.

Appeal from the County Court of Sussex, holden at Brighton.

The action was brought to recover damages for the defendant entering certain land in the occupation of the plaintiff, and throwing down certain hurdles.

The plaintiff was the tenant and occupier of an arable field, called Aldrington Lane, over which was a footpath running diagonally across the field, in a straight direction from one end to the other, and which path, it was admitted by the plaintiff, the public had a right to use, but such user was subject to the right of the plaintiff and others, the owners and occupiers of the field, to plough up the path whenever they required so to do in ploughing the field.

The right of the plaintiff so to plough up the path had been determined by the Court of Exchequer Chamber in *Arnold* v. *Blaker*. (1)

The footway in question is the nearest way by half a mile from the Portslade Station of the London, Brighton, and South Coast Railway to the village and parish church of Portslade, and is the only footpath leading from the village to the station. The railway station was opened for public traffic in 1842, and since that time the number of inhabitants of the village and parish of Portslade has increased very largely. Since 1842 the footway has been much more used by the public than before that time, and the jury found

(1) Law Rep. 6 Q. B. 433

that any path which prevented the plaintiff from ploughing through it as formerly would be a prejudice to him and not a benefit.

After the decision in the case of *Arnold* v. *Blaker* (1) the surveyors removed the material hardening the path, and the plaintiff afterwards ploughed up the path as portions of the field were ploughed up in the ordinary cultivation thereof, and sowed the whole with wheat, but did nothing, after such ploughing up and sowing, to define the path for the use of the public.

After the plaintiff had so ploughed up and sown the field and path, the public continued to walk across the field in the direction where the path had been; but finding the ground where the path had been in a muddy and bad condition, they walked out on either side of it for a better way, and in some parts to a width of eighteen feet or thereabout, injuring thereby the plaintiff's crops.

To prevent the public from so walking out on either side, the plaintiff placed hurdles on the parts which had been thus trodden over by the public at irregular intervals, but not opposite to each other, they being about twelve yards from each other, at right angles to the line where the path had been first trodden out on either side of it, leaving a space of about six feet between the inner ends of the hurdles, and which hurdles were dangerous to the public in the dark. The plaintiff had in previous years placed, at intervals, bushes for a similar purpose after the field had been ploughed, but the public often walked outside of them when the path had become in a bad state.

The defendant threw down three of the hurdles, and it was for such alleged trespass that the present action was brought.

The judge gave judgment in favour of the defendant, on the ground that it was the duty of the plaintiff, after he had ploughed up the path, to set out again a proper path for the use of the public, instead of leaving them to tread out a path in the best way that they could; and that the path so trodden out having become in a muddy and founderous state, the public were justified in deviating on the plaintiff's land to find a firmer and better path. That it was by the plaintiff's own negligence that the alleged trespass was occasioned, and that such negligence contributed to

(1) Law Rep. 6 Q. B. 433.

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the injury complained of, and that the defendant was therefore justified in removing the hurdles.

The question for the opinion of the Court was whether, under the circumstances, the defendant was or was not justified in removing the hurdles.

Manisty, Q.C. (*Grantham* with him), for the plaintiff. The right of the plaintiff to plough up the path was settled in *Arnold* v. *Blaker*. (1) The only right in the public is to cross the field in the line where the path runs; if they deviate from that line they are trespassers, and the plaintiff is justified in preventing them from straying over his field. The decision of the county court judge is clearly wrong.

J. Brown, Q.C. (*Lord* with him), for the defendant. First: The public have an absolute right to pass over the adjoining land when the path is foundrous. Secondly: Inasmuch as the hurdles were put in places where they are dangerous, the defendant was entitled to remove them as nuisances.

[COCKBURN, C.J. The right to deviate may be annexed by prescriptive enjoyment to a highway, but it cannot be presumed to exist as an incident to a limited dedication.]

There is a distinction between public and private ways. There is no right to deviate in the latter case, but there is as to the former. This was decided in *Taylor* v. *Whitehead* (2), and in *Bullard* v. *Harrison* (3), the law is so laid down by Lord Ellenborough. Lord Holt says, in *Young* v. —— (4), that where there is a way through a great open field which may become foundrous the travellers may justify the going over the outlets of the land not enclosed next adjoining; and in Rolle's Abr. tit. "Chimin Common" (A.) it is stated that if a highway become so out of repair and foundrous as to be impassable or even incommodious, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated. In *Henn's Case* (5), a case is mentioned in which the way being foundrous, it was held that the public might deviate into good and passable ground.

(1) Law Rep. 6 Q. B. 433.
(2) 2 Doug. 745.
(3) 4 M. & S. 387, 392.
(4) 1 Ld. Raym. 725.
(5) W. Jones, 296.

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[BLACKBURN, J. That is not an authority; the Attorney-General merely mentions that case in his argument.]

In *Absor* v. *French* (1) the same law is laid down.

[BLACKBURN, J. There the owner of the soil had obstructed the way.]

It is laid down in all the text books, that if a public way is foundrous and impassable, the public have a right to go on to the adjoining land: 2 Bl. Com. p. 36; Gale on Easements, p. 492; Glen on Highways, p. 176; 2 Burn's Justice, 30th ed. p. 984; Williams on Real Property, 9th ed. p. 311.

[BLACKBURN, J. The foundation for those dicta is *Duncomb's Case* (2), but upon examination the facts will be found to be different from the present; the defendant had narrowed the way; moreover, according to the placitum in 1 Rolle Ab. 390 (A.) pl. 1. the public had been from time immemorial accustomed to deviate.]

In *Dawes* v. *Hawkins* (3) the Court assumed that the right to deviate from a foundrous highway existed. As to the second point. The hurdles are placed so near to the highway as to be a nuisance: *Hardcastle* v. *South Yorkshire Ry. Co.* (4); *Barnes* v. *Ward* (5); and being a nuisance, the defendant was justified in removing them.

Manisty, Q.C., in reply, as to the second point. The cases cited decide that if there is a nuisance near a highway, and an injury is caused to a passer by, an action lies, but they are no authority that he may go on the adjoining land to abate a nuisance.

[BLACKBURN, J., referred to *Dimes* v. *Petley*. (6)

MELLOR, J., referred to *Winterbottom* v. *Lord Derby*. (7)]

COCKBURN, C.J. I am of opinion that the decision of the county court judge is wrong. It is quite unnecessary to consider the doctrine that where a road is foundrous, the public may have an immemorial right to pass over the adjoining land. In ancient times, the right might exist; in those days the road passed over uncultivated tracts, and the liability to repair was not well esta-

(1) 2 Show. 28.
(2) Cro. Car. 366.
(3) 8 C. B. (N.S.) 848; 29 L. J. (C.P.) 343.
(4) 4 H. & N. 67; 28 L. J. (Ex.) 139.
(5) 9 C. B. 392; 19 L. J. (C.P.) 195.
(6) 15 Q. B. 276; 19 L. J. (Q.B.) 449.
(7) Law Rep. 2 Ex. 316.

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blished, and for public convenience the passengers were obliged to do the best they could. But in all the cases which have been cited, the dedication to the public had been unlimited. That doctrine is not applicable to a restricted dedication and user of a highway. Here, there has always been a right in the occupier of the land to plough up the path. The path has been in a known direction, and when the occupier of the land ploughs up the way it soon gets into a muddy state; but inasmuch as there has always been a right to plough it the rights of owner of the soil and of the public depend on the circumstance that the dedication is limited; and as the owner had reserved this right the public must accept the terms upon which the way was dedicated. On the second point, I cannot concur in the argument that under the circumstances the defendant was justified in removing the hurdles. He removed them simply in order to enable him to go upon the adjoining land. It may be that, if the defendant had been injured by the hurdles being placed so close to the path, he might have brought an action, but it is a different thing to say that under the circumstances stated in the case, the defendant can abate the nuisance. A private individual can abate a nuisance when necessary to exercise a right, but here the defendant seeks to exercise a right which we hold does not exist. On both grounds the defendant fails.

BLACKBURN, J. The judgment of the county court judge must be reversed. The first question is, whether or not there is a right of deviation from the footway, because the footway is foundrous. There are a great many dicta in the books, but they are all founded on *Duncomb's Case*, in Cro. Car. 366; also to be found in 1 Rolle's Abr. 390 (A), pl. 1. In that case there was a prescriptive highway, and when it was out of repair the public used to deviate on the outlets, which I gather to be certain defined portions of ground, over which the public had immemorially passed. Duncomb had taken possession of the outlets, and therefore had deprived the public of them; and it was held that he was therefore bound to repair the road. But in this case, it is not stated that there was an immemorial right to deviate. It is quite reasonable to say that where there is a prescriptive highway over a close there may be a prescriptive right to deviate on adjoining lands. But it

would require strong authority to persuade me that where there is a limited dedication only, the public would have a right to deviate. In the case cited from Shower (1), it was not necessary to consider whether there was a right of deviation; the plaintiff had stopped up the way. Here the footway is out of repair because it is ploughed up, and it is therefore necessarily foundrous, and to say on that ground that the adjoining cultivated ground is to be trampled over by persons deviating from the footway, is contrary to common sense and justice.

As to the second point, that the defendant can justify the removal of the hurdles, *Dimes* v. *Petley* (2), is in point. It is clear he cannot do so.

MELLOR, J. Whether there could be a limited dedication of a highway was considered in *Arnold* v. *Blaker* (3), and the true doctrine on the subject is there laid down; and when once it is considered that there may be a limited dedication the case is decided. The cases cited by Mr. Brown, are not applicable.

As to the second point, *Dimes* v. *Petley* (4) is in point.

LUSH, J. I am of the same opinion on both points, for the reasons already given.

Judgment for the plaintiff.

Attorneys for plaintiff: *Palmer, Bull, & Fry.*

Attorney for defendant: *W. Clarke.*

(1) *Absor* v. *French*, 2 Show. 28.

(2) 15 Q. B. 276; 19 L. J. (Q.B.) 449.

(3) Law Rep. 6 Q. B. 433.

(4) 15 Q. B. 276; 19 L. J. (Q.B.) 449.

1873
Jan. 25.

HEYMANN *v.* THE QUEEN.

Indictment—Defects cured by Verdict at Common Law—Conspiracy to remove Goods in contemplation of Bankruptcy—32 & 33 Vict. c. 62, s. 11, subs. 4.

There is no distinction between civil and criminal pleadings as to defective allegations which are aided by verdict at common law.

Indictment that "defendant and others unlawfully and wickedly did conspire and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of 10*l.*, that is to say [enumerating divers articles], defendant then being a trader and liable to become a bankrupt."

To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt:—

Held, that the fact of defendant having been adjudged a bankrupt was not necessary to complete the offence of conspiracy; it was complete if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict, to have been proved before the jury; and that the defect was therefore cured by verdict.

Writ of Error by the defendant on a judgment in an indictment for conspiracy.

The first count of the indictment alleged that Moritz Heymann and others named therein, on the 2nd of January, 1872, "unlawfully and wickedly did conspire, combine, confederate, and agree together contrary to the provisions of the Debtors Act, 1869 (1), and within four months next before the presentation of a bankruptcy petition against the said M. H., fraudulently to remove part of the property of the said M. H., to the value of 10*l.* and upwards, that is to say, divers [enumerating different articles], he the said M. H. then and there being a trader, and liable to become bankrupt, against the peace of our Lady the Queen."

The second and fourth counts were in similar terms, for

(1) By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, "Any person adjudged bankrupt . . . shall in each of the cases following be deemed guilty of a misdemeanor . . . 5. If after the presentation of a bankruptcy petition against him, . . . or within four months next before such presentation, he fraudulently removes any part of his property of the value of 10*l.* or upwards."

conspiring to conceal part of the property of M. H.; and for conspiring to fraudulently dispose of goods obtained by M. H. on credit.

Plea, not guilty.

Verdict of guilty of the premises in the first, second, and fourth counts charged, and judgment of eighteen months imprisonment on each count.

The assignments of error were, that the indictment was not sufficient in law; that the object of the conspiracies alleged in the three counts was to commit offences under s. 11 of 32 & 33 Vict. c. 62, s. 11, subs. 4, 5, and 15, which section is limited to persons who have been adjudged bankrupt, whereas in neither of the counts it is alleged that defendant had been adjudged bankrupt. That there was no allegation that any creditor of defendant, entitled to petition, had presented a petition to the Court of Bankruptcy. That there was no allegation that defendant had been trading and was a debtor in 50*l.*, or that he had committed an act of bankruptcy. That there was no allegation that defendant and the other persons knew, at the dates of the alleged conspiracies, that defendant was a person to whom s. 11 of the Debtors Act, 1869, applied.

Jan. 22. *Besley*, for the plaintiff in error. The indictment is not for an offence under the Debtors Act, 1869, but for a conspiracy to commit offences under that Act, and s. 19 of that Act does not apply. It is an indictment at common law, and the facts must be alleged with all the particularity necessary to constitute the offence. In the first place, it is not alleged that any petition was ever presented, or that any adjudication in fact took place. In *Rex* v. *Jones* (1) there was an allegation that the defendant had been adjudged a bankrupt by the commissioners, and that was held insufficient after verdict, as it ought to have been alleged that he was in fact and law a bankrupt. *Rex* v. *Mason* (2) and *Reg.* v. *Peck* (3) shew what particularity is necessary.

[MELLOR, J. Those cases are virtually overruled by later cases.]

No doubt *Sydserff* v. *Reg.* (4) is scarcely consistent with *Reg.*

(1) 4 B. & Ad. 345.
(2) 2 T. R. 581.
(3) 9 A. & E. 686.
(4) 11 Q. B. 245.

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HEYMANN v. THE QUEEN.

v. *Peck* (1); but that case is not noticed in the judgment of the Court.

[BLACKBURN, J., referred to *Nash* v. *Reg.* (2).]

There the indictment was held cured by 7 Geo. 4, c. 64, s. 21. But the present indictment is not for an offence created by any statute, so that the statute of Geo. 4, does not apply. The indictment is at common law, and is therefore bad for not stating all the ingredients of the offence, inter alia, that a petition was presented and the defendant adjudged a bankrupt.

[BLACKBURN, J. That would be necessary to complete the offence under the statute; but in a conspiracy the offence may be complete although the contemplated crime is not committed. Why is it not a conspiracy to conspire to remove goods four months before a contemplated bankruptcy of the owner?]

Possibly it is; but there is no allegation that they conspired in contemplation of bankruptcy.

[BLACKBURN, J., referred to Com. Dig., tit. "Pleader" (C. 87), "By verdict;" and 1 Wms. Saunders, 228, n. (1), as to defects aided by verdict at common law.]

That only applies to civil pleadings.

[BLACKBURN, J. I know of no distinction between civil and criminal pleadings as to this. Is there any authority for saying there is any distinction?]

In 1 Chit. Crim. Law, p. 172, it is said, "It is further laid down that an indictment ought to be certain to every intent, and without any intendment to the contrary; and that it ought to have the same certainty as a declaration; for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observation does not, indeed, sufficiently express the degree of precision required; for technical objections have been more frequently admitted to prevail in criminal than in civil proceedings, and it was expressly laid down by Lord Mansfield (3), that a greater strictness is required in the former than is necessary in the latter; and in the first a defendant is allowed to take advantage of mere formal exceptions."

(1) 9 A. & E. 686. (2) 4 B. & S. 935; 33 L. J. (M.C.) 94.
(3) 1 Leach, at p. 134.

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Jan. 25. *Bromby*, in support of the indictment, was not heard.

BLACKBURN, J. This was a writ of error, argued on behalf of the plaintiff in error on the last crown paper day before the Lord Chief Justice, my Brothers Mellor, Quain, and myself; and at the conclusion of the argument we said we would consider whether it was necessary to hear counsel in support of the conviction, and we have come to the conclusion that there is no occasion to hear counsel.

The indictment was for conspiracy; and I need not cite any authority for the proposition, that a conspiracy is an offence that is complete as soon as there is an agreement to do a thing which would be, if done, though not a crime, such a matter as would bring the agreement to do it within the definition of conspiracy. Here the defendant has been convicted upon an indictment containing several counts, but all the objections raised apply in effect to the first count. [The learned Judge read the count.] On that there is a plea of not guilty, and a verdict of guilty.

The Debtors Act, 1869 (32 & 33 Vict. c. 62), by s. 11, subs. 5, enacts, that a person who has been adjudged a bankrupt, if he has within four months next before the presentation of the petition fraudulently removed his goods, shall be guilty of a misdemeanour. It is clear, that if the agreement, alleged in the count, to enable him to remove his goods, was come to in contemplation of an expected adjudication, the offence would be at once complete, whether adjudication followed or not. The objection to the count, therefore, is that it does not state that the agreement or confederacy was in contemplation or expectation of an adjudication; and if the question had arisen upon demurrer, I am not quite prepared to say that that might not have been a good objection. But it is a general rule of pleading at common law,—and I think it necessary to say, where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases,—where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the

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verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict. The authorities upon that position, and the principles on which it proceeds, are to be found in 1 Williams's Saunders, at p. 228, n. (1). In the present case, if this agreement was in contemplation or expectation of an adjudication, there is no doubt that the offence was committed. The averment in the count is, that the defendant and the others confederated and agreed contrary to the Debtors Act, 1869; and it was a confederacy and agreement fraudulently to remove the defendant's goods contrary to the Act, he being a trader liable to become bankrupt; but it is not expressly stated that it was in contemplation of a petition, but only that it was within four months of the petition. We think, upon the issue of not guilty, the jury could not have found that there was a conspiracy to remove the goods fraudulently and in contravention of the statute, unless it had been proved that it was in contemplation that an adjudication was to ensue. If it was in the contemplation of the parties that an adjudication should take place hereafter, the offence was committed, whether the adjudication followed or not, for the conspiracy is complete as soon as the parties have agreed. We therefore think that the objection comes to nothing, and the conviction must be affirmed.

Judgment affirmed.

Attorney for prosecution: *A. G. Ditton.*
Attorney for defendant: *H. Sydney.*

IN THE MATTER OF WILKINS.

1873
Jan. 16.

Foreign Attachment, Surrender on—Detention after Final Judgment—Discharge from Custody—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5, 29.

A plaintiff in the Mayor's Court, London, had sued the defendant by process of foreign attachment. In order to dissolve the attachment the defendant surrendered himself into custody, and remained in prison until the plaintiff obtained final judgment. On a habeas corpus to discharge the defendant from custody:—

Held, that the process of foreign attachment authorized the detention of the debtor only until final judgment; that the Debtors Act, 1869, s. 29, preserving the custom, did not extend its operation, and did not render lawful the detention of the debtor after judgment; and that the defendant was entitled to be discharged under s. 4.

HABEAS CORPUS directed to the governor of the Debtors' Prison for London and Middlesex to bring up the body of one Samuel Wilkins.

On the 25th of September, 1872, an attachment from the Mayor's Court, London, was placed on the assets of Samuel Wilkins, at his bankers, the London and County Bank, Hackney Branch, at the suit of one William Waine, and at the same time an action was commenced against him in the same court to recover the sum of 79*l.* 10*s.* 10*d.*; and Samuel Wilkins surrendered himself into the custody of the sergeant-at-mace of the Mayor's Court for the purpose of his appearance at the trial of the suit or other determination thereof, and, his surrender having dissolved the attachment, he then drew out the money from his bankers and applied it in payment of certain goods which he had been commissioned to purchase, and for which purpose the money had been remitted to him. On the 2nd of January, 1873, the action was terminated by the plaintiff signing judgment against him for the sum of 80*l.* 19*s.* 2*d.* He had no means of paying the debt or any part of it. On the 6th of January he caused an application to be made to the Mayor's Court for his discharge from custody, but the judge considered that the Court of Queen's Bench was the proper court to apply to, and declined to make any order.

The gaoler having produced the body of Samuel Wilkins,

Kemp moved that Wilkins be discharged from custody. The

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object of foreign attachment is to bring a debtor residing beyond the jurisdiction of the Mayor's Court within reach of its process by attaching his goods. Foreign attachment is a process merely to compel the appearance of the defendant in an action brought against him; and there are three ways in which a defendant may appear in dissolution of an attachment:—1, by bail; 2, by render; 3, by payment of money into court: Brandon upon the Law of Foreign Attachment, p. 106. Here the defendant has appeared by render, and can be detained in custody only up to the time of obtaining final judgment. If it was desired to keep the defendant in custody upon final judgment, the plaintiff formerly had to issue execution and charge the defendant thereon; but inasmuch as imprisonment on final process is now abolished by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, the defendant cannot be detained, and therefore is entitled to his discharge.

L. E. Glyn, contra. The defendant in an action in the Mayor's Court may appear in dissolution of the attachment at any time before the plaintiff has acknowledged satisfaction, but until the debt is satisfied the defendant remains undischarged.

[QUAIN, J. In the notes to *Turbill's Case* (1), it is stated: "A foreign attachment, like the process by distringas in the courts at Westminster, is to no other purpose than to compel the appearance of the defendant."]

Here the defendant has appeared by render, and judgment having been obtained and not satisfied the defendant remains in custody. The render of the defendant to prison in dissolution of an attachment is a voluntary render, and the Debtors Act, 1869, does not apply to the case of a debtor who voluntarily surrenders himself to prison; and, further, by s. 29 the custom of foreign attachment is expressly exempted from its operation.

COCKBURN, C.J. I think it clear that the person brought up before us on habeas corpus is entitled to his discharge. The process of foreign attachment was in ancient times resorted to and established simply as a means of bringing the foreign debtor within the jurisdiction of the Mayor's Court by attachment of any goods that he had within the City. The defendant could only

(1) 1 Notes to Saund. Rep. at p. 91.

dissolve the attachment by satisfying the debt, or by surrendering his person, or by giving bail. The procedure in the case of personal surrender, or putting in bail in lieu of personal surrender, was analogous to arrest on mesne process on a capias ad respondendum; but it is plain that in the Mayor's Court, as in other Courts of Common Law, the detention on mesne process terminated when judgment was obtained in the suit. If bail had been given, the sureties were then bound to surrender the body, and it was necessary to charge the defendant by a writ of capias ad satisfaciendum, if it was intended to proceed against his person and not his goods. An analogous proceeding exists in the Mayor's Court, and where bail had been given or the defendant had surrendered, he could not be detained in custody after judgment without being charged in execution. The legislature has stepped in, and, with the view to prevent the detention of debtors unable to satisfy their debts, has abolished the issuing of writs for charging debtors in execution. The enactment applies to cases in the Mayor's Court. The Mayor's Court, therefore, has lost the power of authorizing the detention of a debtor after judgment. The legislature has excepted from the operation of the Act the custom of foreign attachment. But the custom is preserved only as an auxiliary process, and to enable the Mayor's Court to acquire jurisdiction over a person who is not a resident within the city. The operation of the Debtors Act, 1869, s. 29, must be confined to proceedings in the suit up to judgment, and does not apply after the plaintiff has brought the defendant within the jurisdiction of the Court. Upon the judgment the defendant could not be charged in execution. I do not think a surrender on the preliminary process of foreign attachment has the effect of keeping the defendant in custody when the plaintiff's right has been ascertained.

BLACKBURN, J. I am of the same opinion. The foreign attachment was a means of compelling appearance, and might be dissolved by the defendant giving bail, or surrendering his person to prison. After the defendant is detained in that way judgment is obtained, and the rights of the parties upon this are thus stated in Brandon, Upon the Law of Foreign Attachment, p. 112, "If the plaintiff recover judgment against the defendant in the action, he

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is bound to issue his execution and charge the defendant thereon, or the defendant may apply to the Court to compel the plaintiff to do so." I apprehend this to mean that upon judgment being obtained the defendant must be released from custody if the plaintiff does not charge him in execution, but that a reasonable time is allowed for issuing the writ of ca. sa. after judgment has been signed, and then he would be detained, not under mesne, but under final process. Formerly, if there had been no writ of ca. sa., and the defendant had moved this Court for a habeas corpus instead of applying to the Mayor's Court for his discharge, it might have been a question whether the habeas corpus ought to be granted; but no question of this kind can now arise since the passing of the Debtors Act, 1869, 32 & 33 Vict. c. 62, which by s. 4 enacts, "That with the exceptions hereinafter mentioned no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." Then various exceptions are enumerated; and by s. 5, if the debtor has since the judgment the means of paying the debt and refuses to pay it, the Court may make an order that he be imprisoned. That is a different procedure from charging a debtor in execution; and I suppose might still be put in force against the now defendant; but no facts are stated shewing that he has committed such a default as would allow him to be arrested under s. 5. It is clear therefore that the defendant is entitled to be discharged unless the 29th section authorizes his detention. The legislature by that section, have enacted that the detention of a debtor on foreign attachment, and by s. 6 the compelling him to put in special bail, under certain circumstances, up to the time of judgment being given, shall be still allowed; but I find nothing in those sections placing a debtor detained under a foreign attachment in a different position from that which he would occupy if he had been sued by the ordinary process of the court. An unsuccessful defendant in the Mayor's Court is not now liable to be charged in execution upon judgment being obtained against him, and the effect of the judgment is the same whether the debtor is brought before the court by foreign attachment or by an ordinary summons. I think, therefore, that this Act does not allow the defendant to be detained in execution on final process whether the suit has been commenced

by foreign attachment or by an ordinary summons, and, finding the general purpose of the Act to be the abolition of arrest for debt, except under certain circumstances, I am of opinion that the defendant is entitled to be discharged.

MELLOR, J. I am of the same opinion. It follows from *Turbill's Case* (1) citing *Lewis* v. *Wallis* (2), that the object of foreign attachment is to compel a defendant to appear to a summons. The object of the Debtors Act, 1869, is to abolish arrest for debt after judgment has been obtained, and I think that a creditor who has so established his claim has no longer any power to detain his debtor in custody.

QUAIN, J. I am of the same opinion. The process of foreign attachment is intended to compel an appearance, or, as the Lord Chief Justice has pointed out, to put a plaintiff in the same position as if he had arrested the defendant under a capias ad respondendum before 1 & 2 Vict. c. 110. The defendant may get rid of the attachment either by appearing and putting in special bail or by surrendering himself into custody, and in the latter case he may be said to be arrested on mesne process. It is admitted by the defendant that his detention was lawful until judgment was obtained against him. If the defendant had given a bail bond, by the terms of it the sureties would have been liable, if the plaintiff succeeded, either to pay the amount sued for or to surrender the defendant into the custody of the court. If they took the latter course, that would have discharged them from liability from the bond, but the defendant, after his surrender, might have been charged in execution by a capias ad satisfaciendum. It is also admitted that when the defendant surrendered himself the attachment was dissolved. Foreign attachment being in the nature of arrest upon mesne process, which is abolished by the Debtors Act, s. 6, it was necessary to insert a clause, s. 29, preserving it as exercised in the Lord Mayor's Court; but before that statute foreign attachment only authorized the detention of the debtor until judgment, and it then ceased to have any operation. All power to detain a debtor after the judgment of any

(1) 1 Notes to Saund. Rep. at p. 91. (2) T. Jones, 222, 223.

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court has been abolished, whether or not he has been in custody before judgment, and it follows therefore that the defendant, who does not come within the operation of s. 5, is entitled to be discharged.

Defendant discharged.

Attorneys for plaintiff: *Rickard & Walker.*
Attorney for defendant: *T. Parker.*

Jan. 24.

HUTLEY *v.* HUTLEY.

Champerty—Relationship to One of Parties—Interest in Suit.

Declaration, that J. H., a brother of defendant and a cousin of plaintiff, had died, leaving large real and personal property; that defendant was heir-at-law of J. H., and one of his next of kin; that J. H. left a will whereby his real and personal property was left to persons other than plaintiff and defendant, and plaintiff believed that the will revoked a former will by which J. H. had bequeathed property to plaintiff; and that in consideration that plaintiff would take the necessary steps to contest the will and would advance money and obtain evidence for such purpose and instruct an attorney, defendant promised to share with plaintiff half the real and personal property which might come to defendant by reason of such proceedings:—

Held, that the agreement amounted to champerty; and that the fact, that the plaintiff was a relation of the defendant and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty.

DECLARATION that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir-at-law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purpose and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed

estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of the deceased. Allegation of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

Philbrick (*Pearce* with him), in support of the demurrer. The agreement stated in the declaration is clearly maintenance, or, rather, champerty, unless it be brought within the exception as to relationship or interest: *Earle* v. *Hopwood* (1); 2 Inst. 207; 4 Bl. Com., pp. 134, 135; 32 Hen. 8, c. 9; *Sprye* v. *Porter* (2); *Stanley* v. *Jones*. (3) Then as to the relationship, the plaintiff and defendant are at most cousins, one being stated to be the cousin and the other the brother of the testator; that relationship is clearly insufficient to justify the agreement. In 1 Hawkin's P. C., p. 458 (8th ed.), tit. "Maintenance," s. 26, it is said: "It seems to be agreed that whoever is in any way of kin or affinity to either of the parties, so long as the same continues, or but related to him by being his godfather, may lawfully stand by him at the bar and counsel and assist him, and also pray another to be of counsel for him; but that he cannot justify the laying out of his own money in the cause, unless he be either father, or son, or heir apparent to the party, or the husband of such heiress." Secondly, as to the interest, all that is alleged is that the plaintiff believed that he had an interest under a former will.

[BLACKBURN, J. A bonâ fide belief, though erroneous, would seem to be sufficient to prevent assisting in a suit being maintenance in the criminal sense.]

No doubt it was decided in *Findon* v. *Parker* (4) that a reason-

(1) 9 C. B. (N.S.) 566; 30 L. J. (C.P.) 217.

(2) 7 E. & B. 58; 26 L. J. (Q.B.) 64.

(3) 7 Bing. 369.

(4) 11 M. & W. 675.

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able ground for believing that they had a common interest would justify persons maintaining a suit. And that case was followed by Wigram, V.C., in *Hunter* v. *Daniel* (1); but there the interest was direct, and identical with that of the parties to the suit. Here at most it is collateral only.

[BLACKBURN, J. Moreover that was a case of maintenance, not champerty.]

That distinction makes the case no authority for the present plaintiff.

Day, Q.C. (*Anderson* with him), for the plaintiff. It is stated that the plaintiff believed he had a direct interest in establishing the invalidity of the will which left all the property away from the defendant, so that the interest of the plaintiff and defendant was identical. In *Findon* v. *Parker* (2) Lord Abinger, C.B., remarks in the course of the argument: "Surely the old cases are now exploded. The sole question is, have the parties an interest, or do they believe they have an interest in the action?" And when counsel cited Co. Litt. 368 b., maintenance is "when one maintaineth the one side without having any part of the thing in the plea or suit;" Rolfe, B., said: "Surely in a matter which is considered criminal, that must mean, without having, or *believing* himself to have, an interest;" and in his judgment he says, illegality is not to be presumed; any construction which can be put upon the agreement making it lawful must be adopted.

[BLACKBURN, J. The agreement in *Sprye* v. *Porter* (3) was less open to objection than the present agreement.]

There the plaintiff had no interest whatever.

[LUSH, J. How does this kind of collateral interest prevent this agreement from being champerty, which is said to be the most odious form of maintenance?]

In 2 Roll Ab. p. 115, tit. "Maintenance," (H) "Consanguinity," it is said: "Some books say generally that a man may maintain his blood," or "his ally, 9 Hen. 6, 64."

Philbrick was not heard in reply.

BLACKBURN, J. The question is whether the contract disclosed

(1) 4 Hare, 420, 431. (2) 11 M. & W. at p. 679.
(3) 7 E. & B. 58; 26 L. J. (Q.B.) 64.

on this declaration is such as can be enforced in a court of law. Putting out of the question, for the moment, the position of the plaintiff, it alleges that the defendant is heir-at-law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate, which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal: *Sprye* v. *Porter* (1) was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the Court says: "Here we have maintenance in its worst aspect, the plaintiff and *Rosaz*, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one fifth of the property when so recovered; and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, *evidence;* and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal: and *Stanley* v. *Jones* (2) is an express authority to that effect." Putting aside

(1) 7 E. & B. 58, 81; 26 L. J. (Q.B.) 64, 71. (2) 7 Bing. 369.

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that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far as that the present plaintiff only agrees to obtain evidence, whereas in *Sprye* v. *Porter* (1) the plaintiff undertakes to supply evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said shewed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in *Findon* v. *Parker* (2), that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit; I can not see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject matter of the suit were true,

(1) 7 E. & B. 58; 26 L. J. (Q.B.) 64. (2) 11 M. & W. 675, 679.

that would not justify or make legal the agreement to share in the property to be recovered by the defendant. There must, therefore, be judgment for the defendant.

LUSH, J. I am of the same opinion. It is conceded by the plaintiff's counsel that if it were not for the plaintiff's interest the contract in the declaration would amount to champerty. First, the plaintiff is a cousin of the deceased; that would give him no interest. Nor would the relationship to the defendant justify an agreement of champerty. Then there is the allegation that the plaintiff believed that the will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and assuming that this shews that the plaintiff had, or thought he had, a collateral interest in contesting the will, that collateral interest would not justify an agreement to share the property which the defendant should acquire by successfully contesting the will. There are cases which shew that there are circumstances which may justify a person in maintaining, that is, in assisting, one of the litigant parties in a suit; certain relationship would justify maintenance; but I know of no case, and Mr. Day has not produced the semblance of an authority for saying that relationship or collateral interest justifies champerty. Therefore the additional allegations in the declaration do not make the agreement good.

ARCHIBALD, J. I am also of opinion that the declaration is bad. It does not shew any circumstances, either on the ground of relationship or interest, to make the agreement good. There are cases to shew that a common interest, or even a bonâ fide belief in the existence of a common interest, would justify the mere maintenance of the suit; but they go no further. The present case falls within the principle of *Sprye* v. *Porter* (1).

Judgment for the defendant.

Attorney for plaintiff: *Ditton.*

Attorneys for defendant: *Paterson, Snow, & Burney.*

(1) 7 E. & B. 58; 26 L. J. (Q.B.) 64.

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Jan. 22.

BAILEY, APPELLANT; WILLIAMSON, RESPONDENT.

Parks Regulation Act, 1872 (35 & 36 *Vict. c.* 15), *ss.* 4, 9, 11, *sch.* 1, *Regulations* 8, 19, 20—*Rules enforceable before laid before Parliament.*

By the Parks Regulations Act, 1872 (35 & 36 Vict. c. 15), s. 4, any person who does an act in contravention of any regulations in sch. 1, shall, on conviction, be liable to a penalty; but the regulations shall not take effect till one month after the passing of the Act. By regulation 8, no person shall deliver any public address in a park except in accordance with the rules of the park, which, by regulations 19 & 20, are rules made by the ranger or commissioners of works, and issued under the seal of the commissioners. By s. 9, any rule made in pursuance of sch. 1 shall be forthwith laid before the Houses of Parliament if sitting, or if not, within three weeks after the beginning of the next session; and if any of such rules shall be disapproved of by either House within a month after the same has been laid before Parliament, such rules or parts of rules as shall be disapproved of shall not be enforced. The Act passed on the 27th of June, 1872. Rules for Hyde Park were made and published on the 30th of September, Parliament being then not sitting, and in November the appellant was convicted of delivering an address in the park not in accordance with one of the rules:—

Held, that by s. 4 the regulations, together with the rules if made, took effect one month after the passing of the Act, and could at once be confirmed; and s. 9 imposed a condition subsequent, by which any rule disapproved of by either House of Parliament was not to be enforced after such disapproval.

Held also, that there was no right in the public to hold meetings in the royal parks, and therefore there was no right interfered with within s. 11; and that the conviction was therefore right.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

1. The appellant appeared on a summons to answer the complaint of the respondent, which charged the appellant under s. 4 of the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15) (1),

(1) 35 & 36 Vict. c. 15: "An Act for the regulation of the royal parks and gardens," passed on the 27th of June, 1872, reciting that "it is expedient to protect from injury the royal parks, gardens, and possessions under the management of the commissioners of Her Majesty's works and public buildings, hereinafter called the commissioners, and to secure the public from molestation and annoyance while enjoying such parks, gardens, and possessions . . . ."

By s. 1, "This Act may be cited for all purposes as 'The Parks Regulation Act, 1872.'"

By s. 4, "If any person does any act in contravention of any regulation

for that he did unlawfully act in contravention of regulation 8 contained in the first schedule annexed thereto, by delivering a public address in Hyde Park not in accordance with the rules of the said park, contrary to the statute, &c.

A copy of the rules of Hyde Park, made under regulations 19 & 20 in the first schedule to the Act, was put in evidence. These rules were signed by the ranger, the Duke of Cambridge,

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contained in the first schedule annexed hereto, he shall, on conviction by a court of summary jurisdiction, be liable to a penalty not exceeding five pounds; but the regulations contained in the said schedule shall not take effect until the expiration of one calendar month after the passing of this Act."

By s. 9, "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced."

By s. 10, "Copies of regulations to be observed in pursuance of this Act by persons using a royal park to which this Act applies shall be put up in such park in such conspicuous manner as the commissioners may deem best calculated to give information to the persons using the park."

By s. 11, "Nothing in this Act shall authorize any interference with any rights of way or any right whatever to which any person or persons may be by law entitled."

By s. 13, "Nothing in this Act contained shall be deemed to prejudice or affect any prerogative or right of Her Majesty, or any power, right, or duty of the commissioners, or any powers or duties of any officers, clerks, or servants, appointed by Her Majesty or by the commissioners."

The first schedule: "Regulations to be observed by persons using the royal parks . . . .

8. "No person shall deliver, or invite any person to deliver, any public address in a park except in accordance with the rules of the park.

19. "For the purpose of this schedule 'the rules of the park' shall be deemed to be such rules as may in relation to any matter within the jurisdiction of the ranger (if any) of of the park be from time to time made by the ranger, and in relation to any other matter to which these regulations are applicable be from time to time made by the commissioners of Her Majesty's works and public buildings.

20. "Any rules, whether made by the ranger or by the commissioners of Her Majesty's works and public buildings, shall be issued under the common seal of the said commissioners; and any rules purporting to be the rules of the park may be proved by the production of a copy thereof purporting to be printed by the printers of Her Majesty."

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and were under the seal of the commissioners of works and buildings, and were also signed "George Russell, Secretary." (1)

Copies of the regulations and of the rules so made were posted in conspicuous places in the park at the several entrances thereto on boards on the 30th of September, 1872.

In one spot in the park a notice was put up on an iron post, which was firmly fixed in the ground on a granite base, and on which was inscribed, in a conspicuous manner on an iron plate, the 11th of the said rules, with a heading to it, as follows:

"THE NOTICE BOARD RESPECTING PUBLIC ADDRESSES.

"No public address may be delivered except within forty yards of the notice-board on which this rule is inscribed."

On Sunday, the 3rd of November, 1872, several hundreds of persons walked into the park, and assembled there for the purpose of holding a public meeting. A chairman was appointed, who addressed the assembly, and the appellant then addressed the persons there assembled, and concluded by moving the first resolution.

The addresses delivered by the appellant and by the other speakers were delivered at more than forty yards distance from the notice-board containing only the 11th rule, viz., at a distance of 106 yards therefrom, and at a very much longer distance from the notice-boards containing complete copies of the Regulations and Rules.

(1) "Rules of the park for Hyde Park in connection with the regulations prescribed by 'The Parks Regulations Act,' 1872.

11. "No public address may be delivered except within forty yards of the notice-board on which this rule is inscribed.

12. "No public address of an unlawful character, or for an unlawful purpose, may be delivered.

13. "No public address may be delivered unless a written notice of the intention to deliver the same, signed with the names and addresses of two householders residing in the metropolis, be left at the office of the commissioners of Her Majesty's works and public buildings, at least two clear days before; such notice must state the day and hour of intended delivery. After such a notice has been received, no other notice for the delivery of any other address on the same day will be valid.

"George, Ranger.

"Seal of the Commissioners.

"George Russell, Secretary."

No notice had been left at the office of the Commissioners of Works, as required by rule 13.

On the part of the appellant it was, amongst other things, contended:

That by s. 9 of the Act, any rules made in pursuance of the Act should, in order to become valid, be first approved of by Parliament. (2)

That if the said rules acquired any validity without such approval of Parliament, it was only such as would have enabled the park-keepers and the police-constables to enforce compliance with such rules, but not such as would render non-compliance with such rules a misdemeanour punishable by fine or imprisonment.

That s. 11 of the Act prohibited interference with any right to which any person was at the passing of the Act by law entitled. That the appellant was at the time of the passing of the Act entitled by law to deliver a public address in Hyde Park, and that the rules for the violation of which the appellant was summoned amounted to such interference with the right as was prohibited by the Act.

That the authority given by the 19th regulation of the 1st schedule of the Act to the ranger and commissioners of works to make rules from "time to time" was intended by the legislature to be used only in exceptional circumstances which could not in the ordinary course of things be foreseen.

That the 12th rule by implication legalized the delivery in Hyde Park of a public address if of a lawful character and for a lawful purpose, and that the public address delivered by the appellant was of such a character and for such a purpose.

That on the question of a pre-existing right to deliver a public address in Hyde Park before the passing of this Act, a magistrate would have no jurisdiction.

The magistrate was of opinion that the appellant did commit the offence mentioned in s. 4 of the Act, viz., that he unlawfully and wilfully did an act in contravention of the 8th regulation, by delivering a public address in Hyde Park not in accordance with the rules of such park; that the said rules were valid; that the appellant delivered his public address not in accordance with either rule 11 or rule 13; and, further, that, notwithstanding the contention on behalf of the appellant that he had a pre-existing right under s. 11 of the Act to deliver a public address in Hyde Park, the magistrate was justified in and had jurisdiction to convict the appellant; and he convicted him accordingly.

The question for the opinion of the Court was, whether the magistrate was wrong in point of law in convicting the appellant.

(2) The Act passed on the 27th of June, 1872; Parliament was prorogued in August, so that the rules, made and published on the 30th of September, could not be laid before Parliament.

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Baker Greene (*S. Hallett* with him), for the appellant, urged the above points, and, in addition, that the rules were invalid, being all, whether within the jurisdiction of the ranger or of the commissioners, in one table, signed by the ranger and under the seal of the commissioners.

Sir *J. D. Coleridge*, *A. G.* (*Poland* with him), for the respondent, was not heard.

COCKBURN, C.J. We are of opinion that the conviction was right and must be upheld. The conviction was under the recent Act intituled "An Act for the Regulation of the Royal Parks and Gardens," and was for the infringement of the regulations and rules established by that Act, which was an Act passed to protect the royal parks from injury, and to protect the public in the enjoyment of those royal parks and other royal possessions for the purpose of innocent recreation and exercise.

The habit of using the metropolitan parks for other purposes than those of recreation and exercise is of modern growth, and it had produced certain inconveniences which required to be modified, and the use of the parks for such purposes required to be regulated by statutory enactments. This statute was passed for that purpose. The Act has annexed to it a schedule, which declares that certain things shall not be done in the royal parks, except under certain circumstances and conditions; but that schedule, which is a schedule of regulations, is evidently to be supplemented and made complete by rules to be made for the purpose by the ranger (of Hyde Park in the present instance, which is the case we have to deal with,) and by Her Majesty's Commissioners of Works and Public Buildings, according as the particular subject matter as to which the rules are to provide is within the jurisdiction of the ranger or within the jurisdiction of the commissioners.

The regulation which is in question in the present instance is the 8th regulation of the schedule, that "No person shall deliver, or invite any person to deliver, any public address in a park, except in accordance with the rules of the park." That, as I said before, pre-supposes that that regulation should be made complete by supplementary rules, which would be made by the competent authority in that behalf. It is in this instance supplemented by

the 11th, 12th, and 13th of the rules relating to Hyde Park. The appellant has been convicted, upon facts which do not admit of any dispute, of having infringed the 11th rule, by having delivered an address otherwise than within forty yards of the notice-board upon which this rule had been inscribed. That being so, he is within the Act of Parliament, unless any of the objections taken by his counsel should be considered by the Court as established.

The first objection is, that these rules are not to come into effect until they have been laid before Parliament, and the objection is founded on s. 9, which says: "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either house of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced." And the contention on the part of the appellant is, that that means that none of these rules—no rule made as supplementing the schedule—shall be operative, so as to render a person liable to be convicted for an infraction of it, unless the rules have been laid before Parliament, if Parliament is then sitting, or shall be laid before Parliament when Parliament next meets, if Parliament be not sitting at the time the rule is made.

I cannot put that construction upon the language of that section. I quite admit that it would have been much more satisfactory if it had been distinctly stated whether the rules, if they were made when Parliament was not sitting, were to be operative in the interval from the time they were made to the time when Parliament should next meet; or, if Parliament was sitting, whether they were to be operative or not for the month during which Parliament has an opportunity of expressing its opinion upon them. It would have been better if it had been distinctly and clearly expressed, as it was in the Act of 13 Vict. c. 16, an Act which enables the judges of the courts of common law at Westminster to alter the forms of pleading by rules and regulations made by them. That distinctly declares that the rules are to have no effect during the interval of three months after they have

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been laid before Parliament. But that is not so in this case. Was it, then, intended that the Act should in the meantime be inoperative? I think not, because the regulations are to come into effect within one month after the Act itself comes into operation. It is contemplated by the legislature in the statute itself, that those regulations, which are to come into force within one month of the statute, shall be supplemented by rules to be made; and it seems to me that the rules must be considered as coming into operation by virtue of the statute and the regulations in the schedule from the time the rules are made; subject to this, that if those rules should appear to either House of Parliament then sitting or when it next meets, as unreasonable and improper, then either House of Parliament has the power reserved to it by the statute, instead of a new statute being enacted, to repeal what has been done under the former one, and to disallow all or any of the rules. But, subject to this, it seems to me that the rules must be considered as operative, and that, if a person chooses wilfully to violate the rules, he is subject to the penalty which the Act prescribes by s. 4.

The next objection is, that the rules are such as the ranger or the commissioners had no power to make. I think it is quite clear that the regulation as to rules being made by one or other of those authorities, for the purpose of imposing conditions on the delivery of addresses in the park, was clearly within the jurisdiction of the ranger or the commissioners, as the case might be; and that being so, we have no authority here to look into the rules to see whether they are reasonable and proper or not. Parliament has reserved that power to either House, but it has not conferred it upon us. If the rule made is within the scope of the authority given by the legislature, there is an end of the matter so far as we are concerned.

Then it is further said that the rules are invalid, because some of them being within the scope of the authority of the ranger, and some of them within the scope of the authority of the commissioners, and the Act of Parliament distinguishing between the two, all these rules are included in one body of rules signed by the ranger, the Duke of Cambridge, and having the seal of the commissioners affixed. And it was contended that, although the

rules were within the jurisdiction either of the one or of the other, that this joinder rendered the rules bad, and that they ought to have been separately signed in the one case by the ranger, and sealed in the other case by the seal of the commissioners. I do not think that that is at all a valid objection. It must be assumed, there being nothing to shew the contrary, that all these rules are within the authority of either the one or the other of those public officers, and I see no harm in their having united the rules in one instrument, and affixed the signature and the seal, which must be taken to apply respectively to those rules which are within the jurisdiction of the one or of the other.

Another and distinct objection was raised under s. 11, that "Nothing in this Act shall authorize any interference with any rights of way, or any right whatever, to which any person or persons may be by law entitled." It was contended that the public are entitled to the use of the parks as of right for the purpose of passing over them, and for the purpose of delivering addresses. That is a proposition which I own sounds to me very startling. I always understood that the parks, at least the parks to which the Act of Parliament relates, were the property of the Crown, and they are so treated in the Act of Parliament, which proceeds upon that assumption. I have always understood and believed, that whatever enjoyment the public have been allowed to have of these parks and royal possessions for any purpose has been an enjoyment which the public have had by the gracious concession of the Crown. It is clear that the legislature in this very Act of Parliament proceeded upon that assumption, because,—whilst s. 11, I will not say reserves all the rights, but excludes the operation of the statute in respect of any rights to which the public may be entitled by law, such as a right of way,—the Act deals with the question of the making of addresses in the park as a matter within the scope of the Act itself, which it would not be if it were a right to which the public were by law entitled, as it would then fall under the exception in s. 11. I do not think that that is an argument which we can listen to at all.

It seems to me, therefore, that the rules made were made within the jurisdiction of the ranger or of the commissioners; that they are sufficiently authenticated to satisfy the exigencies of the Act

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of Parliament by having the signature of the ranger and the seal of the commissioners attached to them in the same instrument; that they are within the scope of the jurisdiction of the one or of the other; that we cannot question their validity in this court; and that there is nothing in s. 11 which at all interferes with the operation of the Act with respect to that which has been the subject matter of the present appeal.

I think, therefore, that the conviction was right, and that the appeal should be dismissed.

BLACKBURN, J. I am also of opinion that the conviction was right. The parks are the property of the Crown,—not the immemorial property of the Crown, for some of them were purchased within historical memory certainly, but they have been the property of the Crown for a great many years past. Those parks which the Act of Parliament refers to have been under the management of the Commissioners of Woods and Forests. The Commissioners of Woods and Forests have managed the parks for the Crown, and they have devoted them to a great extent to the purpose of public recreation, and for the benefit of the public enjoying them. I take it that if any minister of the Crown were ill-advised enough to revoke that, and to endeavour to stop the enjoyment by the public of the parks in London, which they have had for so long a period, he would probably be checked very speedily by Parliament; but I apprehend that in a court of law there would be no power to say that he could not do it. When a thing was done which was not according to law, when any act was done to or in the parks which was objected to by those who had the management of them, the only remedy at common law that I am aware of was by an information of intrusion in the nature of trespass brought by the Attorney-General against the individual. That would be a troublesome mode of enforcing the right of the Crown to prevent people coming and making speeches in the parks. That being the state of things, this Act of Parliament was passed; and it says, "It is expedient to protect from injury the royal parks, gardens, and possessions under the management of the Commissioners of Her Majesty's Works and Public Buildings, and to secure the public from molestation and annoyance while enjoying

such parks, gardens, and possessions." And then for that purpose there is power given by s. 4, that "if any person does any act in contravention of any regulation contained in the first schedule annexed hereto, he shall, on conviction by a court of summary jurisdiction, be liable to a penalty not exceeding 5*l.*; but the regulations contained in the said schedule shall not take effect until the expiration of one calendar month after the passing of this Act." It is very plain and intelligible what that means. "We have enacted certain regulations, which are to be found in the first schedule; those who infringe them shall be summarily convicted in a penalty not exceeding 5*l.*; but they shall have fair warning, and therefore these regulations shall not come into force until one month after the Act is passed;" and as the Act passed on the 27th of June, that would not be until the 27th of July. After that time those regulations would be enforced by summarily convicting those who violated the regulations in a penalty not exceeding 5*l.* The schedule contains, amongst others, this regulation: "8. No person shall deliver, or invite any person to deliver, any public address in a park, except in accordance with the rules of the park." The regulation implies and involves in itself that rules are to be made as to how and when an address is to be made, and the delivery of an address in contravention of those rules would be a breach of this regulation, and consequently the person would be liable to a penalty. Then there is regulation 19, which says: "For the purposes of this schedule 'the rules of the park' shall be deemed to be such rules as may in relation to any matter within the jurisdiction of the ranger (if any) of the park be from time to time made by the ranger, and in relation to any other matter to which these regulations are applicable, be from time to time made by the Commissioners of Her Majesty's Works and Public Buildings." The only thing observable there is, that it states that the rules are to be made "from time to time." There is no particular time mentioned, as when a rule is found desirable, and so on. Lastly, regulation 20 says: "Any rules, whether made by the ranger or by the Commissioners of Her Majesty's Works and Public Buildings, shall be issued under the common seal of the said commissioners; and any rules purporting to be the rules of the park may be proved by the production of a copy thereof pur-

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porting to be printed by the printers of Her Majesty." That certainly seems to me in express terms to say, that the rules, without more are to be proved by a printed copy from Her Majesty's printers.

But, then, there is s. 9, as to the rules being laid before Parliament, which involves a point that was, I think, properly raised, and is a plausible point to be considered. It is quite clear that in giving the power to the commissioners to make rules of that sort, which would afterwards be enforceable by penalty, the legislature might very reasonably and properly have done one of two things. They might have said, "Inasmuch as there is a long parliamentary recess, as there is a period of nearly six months when Parliament is not sitting, you, the Commissioners of Works, may make rules for the protection of the public during those six months, and they shall be enforced from the time they are made; but we reserve to ourselves this, that you shall lay them before Parliament as soon as Parliament meets, and then, if either House of Parliament expresses their disapproval of them, they shall no longer be enforced." In other words, the disapproval by Parliament shall be what is technically called a "condition subsequent," annulling the rules which have already been made. That would be perfectly intelligible and sensible. Or the legislature might have said this: "We will not trust you, the Commissioners of Works, further than this: you may prepare rules, but those rules shall have no effect until they have been laid for a month on the table of the Houses of Parliament, so that we may see whether we will approve them or not; we will not trust you further than that, and consequently we will make this period of a month elapsing a condition precedent to the rules having any force." Either of those things might have been done. Each has been enacted in other Acts of Parliament. The question is, which of the two this 9th section expresses?

It says: "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament." Here, it is to be observed, a rule had been made and had been published under the seal of the commissioners, and had been

printed by the Queen's printers. Six months might elapse during the interval before Parliament met before it would be possible to lay it before them. Then the section goes on: "And if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced." If it had been said in express words, "shall not thereafter be enforced," the case would have admitted of no possible argument. It is "shall not be enforced," not putting in the word "thereafter." The question is—Does that mean that the rule which had been made and published shall not be enforced ab initio, and that this laying before Parliament shall be made a condition precedent? I can only say that it does not seem to me to be the intention expressed by the legislature. I think the legislature has expressed the intention that the rules shall be made, and an intention that if after the period limited Parliament expresses its disapproval it shall cease to be a rule; but it is to be a rule up to that time, and, as such, any transgression of it may be punished by a summary conviction under s. 4.

As to the other objection, under s. 11: that section no doubt says that "nothing in this Act shall authorize any interference with any rights of way, or any right whatever to which any person or persons may be by law entitled." The appellant's counsel seemed to be under the idea which has been put forward lately, that persons were by law entitled to do what they liked in the parks, to make speeches or anything of the kind. I am aware of no legal principle and no authority, and I am quite confident that there is no enactment which says anything of the sort. I am sure that persons are not entitled by law to make addresses in the parks, and consequently the passing of this Act, which says that they shall not make an address, by no means interferes with any right to which by law they were entitled. In Hyde Park I believe there is no right of way. In Richmond Park a right of way is established, and consequently the gates are never closed to foot passengers through that park; foot passengers are admitted all night. And s. 11 protects that right. In Hyde Park there is no right of way that I ever heard of, and I certainly have not heard

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it proved in this case that there is any. That argument, therefore, I do not think is even a plausible argument.

And as to the technical objections which have been taken to the regulations, I think they have already been sufficiently dealt with by my lord. I do not wish to say anything more about them, except that I do not even think they are plausible.

MELLOR, J. I am entirely of the same opinion. The object of this statute is to make regulations, in order to give further protection to the parks, as appears from the preamble; and if one only attends to the language of s. 4 it is perfectly clear that as Parliament was going to make a great alteration in the management of the parks, and to make regulations which would not at once become notorious, it was necessary to give a period of time in order that the public might become aware that such an Act of Parliament had passed, and might also become aware of the regulations which are contained in the schedule. And accordingly it is provided that "the regulations shall not take effect until the expiration of one calendar month after the passing of this Act." The language is clear. But when we come to deal with the rules made by the commissioners, which, as my lord has said, were for the due carrying out of the general regulations, and are only supplementary in order to give the best practical effect to the general regulations, there the language is entirely different. The 9th section does not say that they shall not take effect until approved by Parliament. It says nothing of the kind. What it says is, that "Any rule made in pursuance of the first schedule of this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced." If the Legislature had intended this to mean the same thing as in s. 4, that the rules should not take effect until they had the sanction of Parliament, why did they not use the very words used in the 4th section, in which

they expressly state that the regulations shall not take effect until the expiration of one calendar month after the passing of this Act? I confess that I entertain no doubt whatever that they intended nothing of the kind.

I entirely agree with the answer which my lord has given to all the other objections which have been raised; and therefore I think that the conviction must be affirmed.

QUAIN, J. I agree that the respondent is entitled to the judgment of the Court. It appears to me that there is only one real and serious objection which could be urged in this case, and that is the objection raised under s. 9. It is no doubt a fair argument that until these rules have been impliedly approved (because actual approval is not necessary) they ought not to come into force, and were not intended by Parliament to come into force. Let us see whether that was really the intention of the legislature. In the first place, one would think it would be very strange that these regulations should not come into force until the next session of Parliament. But it may be said, as has been said by the appellant's counsel, that as this Act was passed on the 27th of June there was ample time, if the rules had been made at once, within which Parliament might have expressed its disapproval before the prorogation of Parliament. But if we look at s. 4 and read it with these rules and regulations made, and then look at s. 9 as coming after it, it appears to me that the only construction consistent with the language used, is that these rules are in force as soon as they are properly made, within the jurisdiction either of the ranger of the park or of the commissioners; and that, having come into force when made, they continue in force until one of the Houses of Parliament has disapproved of them.

The 4th section, under which the present conviction has taken place, enacts that, "If any person does any act in contravention of *any regulation* contained in the first schedule annexed hereto, he shall, on conviction by a court of summary jurisdiction, be liable to a penalty not exceeding 5*l.*; but the regulations contained in the said schedule shall not take effect until after the expiration of one calendar month after the passing of this Act." What are the regulations in the first schedule? Those regulations are of two

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kinds: the first, regulations that do not depend upon the future making of any rules, and the other, regulations that do, and the regulation now in question is one which contemplates the making of rules. Now I take it that as soon as the rules are made either by the ranger or by the commissioners, within their respective jurisdictions, then the rules are incorporated in the regulations; and that, reading s. 4 in that way, the rules, if made, would have come into force at the expiration of one calendar month after the passing of the Act: because the rules, when properly made, became a part of the regulations, and the present appellant is properly charged in the information with contravention of the 8th regulation, inasmuch as the regulation incorporates the rules. Is there anything in s. 9 which says that, notwithstanding the express provision in s. 4 that the rules shall come into effect (because I read rules as being incorporated in the word regulations), at the expiration of one month after the passing of the Act, if the rules are made, is there anything in s. 9 which says, notwithstanding this, that the rules shall not come into force until they have been laid before Parliament and have been before Parliament for one month? If you look at s. 9, you find that it contains no negative language of that kind at all. I find in the statute to which the Lord Chief Justice has referred (13 Vict. c. 16), under which we make our own statutory regulations and rules, these words: "and no such rule, order, or regulation shall have effect until three months after the same shall have been laid before the Houses of Parliament," clearly shewing that where it is the intention that rules made under the Act shall not have immediate effect, but an after effect, there is an express negative clause in the statute in order to express that intention. We have no negative words at all in s. 9. The approval of Parliament is not at all necessary. It is very remarkable that the word used is "disapproved," so that the act must be an act of disapproval on the part of Parliament, and not of approval. And the section does not say that the rule, if disapproved, shall be null and void, or of no effect, or that it shall be repealed, or anything of that kind; but it simply says that it shall not be enforced. It seems to me, therefore, looking to what the Act was intended to cover, and what objects it had in view, namely, to protect these parks from injury, and to secure the public from molestation and annoy-

ance whilst enjoying the parks, that the legislature must have intended that the rules should come into force, as soon as they had been properly made, and the power exercised after the passing of the Act, under the 4th section, and that they should continue in force until either House of Parliament had expressed its disapproval of any rule, or any part of any rule, and then from that time that rule, or that particular part of any rule, should not be enforced.

It is true that there may be the inconvenience which has been pointed out that a man might have been convicted under these rules, and might have suffered punishment under these rules, and then one House of Parliament might have disapproved of the very rule under which he had been convicted. No doubt that inconvenience may occur. But it is no more an inconvenience than where a man is convicted under a temporary Act whilst it is in force. The Act may be repealed, and he is no longer liable to the same penalty.

I think, therefore the respondent is entitled to the judgment of the Court.

Judgment for the respondent. (1)

Attorneys for appellant: *Merriman, Powell, & Co.*

Attorney for respondent: *Solicitor of the Office of Works.*

(1) On the 10th of February, 1873, the rules for Hyde Park were laid before Parliament, the rules as to addresses being new, the above rules 11, 12, & 13, having been cancelled.

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THE QUEEN *v.* LEFROY.

Inferior Court of Record—County Court, Jurisdiction of, over Contempt committed out of Court—9 & 10 Vict. c. 95, ss. 3, 113.

By 9 & 10 Vict. c. 95, s. 3, the county courts were established and were made courts of record. By s. 113 the judge is empowered to impose a fine not exceeding 5*l.*, or to imprison for a term not exceeding seven days, for any contempt committed in court.

Held, that the jurisdiction of the judge of a county court was confined by s. 113 to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court.

Semble, that inferior courts of record have only power over contempts in facie curiæ.

RULE calling on the Judge of the Somersetshire County Court, holden at Crewkerne, to shew cause why a writ of prohibition should not issue prohibiting him from proceeding against one J. H. Jolliffe, for alleged contempt of court.

It appeared from the affidavits that in a plaint of *Larcombe* v. *Marsh*, in the County Court of Crewkerne, a verdict and judgment had been given for the defendant, and a judgment summons obtained against the plaintiff for the costs. On the hearing of the summons, in investigating the plaintiff's means of payment, the judge made some strong observations on Mr. J. H. Jolliffe, who was attorney for the plaintiff, imputing to him misconduct towards his client. The matter was referred to the Registrar, to ascertain what means, if any, the plaintiff had.

Pending this inquiry Mr. Jolliffe wrote a letter, which was published in a local newspaper, commenting in strong terms on the conduct of the judge; and saying, as to one statement made by the judge, "The statement was a monstrosity, and, as I can now say without fear of an arbitrary or tyrannical abuse of power, an untruth." On this the judge caused a citation to be served on Mr. Jolliffe to appear at the next court to be holden on the 18th of October, 1872, to answer for his contempt.

A prohibition was immediately applied for at Judges Chambers, and on the hearing before Quain, J., he referred the matter to the Court, ordering a stay of proceedings in the mean time.

In Michaelmas Term this rule was obtained, on the ground that

the judge of a county court had no power to punish for contempt not committed in the face of the Court.

Manisty, Q.C., and *Oppenheim*, shewed cause. The writing and publishing of this letter, pending the proceedings to which it referred, was clearly a contempt of the court. In such a case it is clear that the superior courts could have visited the contempt, though out of court: see *Rex* v. *Almon*. (1) The case is not within s. 113 of 9 & 10 Vict. c. 95 (2), the contempt not being in court; but the county courts, being made courts of record by sect. 3, have the same power as the superior courts: see *Rex.* v. *Faulkner* (3); *Ex parte Pater* (4). In *Rex* v. *Clement* (5), Holroyd, J. says: "It is perfectly clear, as to the Courts of Westminster, that contempts may not only be in the face of the court, but that they may be committed out of the court. . . . Courts inferior to the Courts of Westminster may clearly fine and imprison for a contempt, if they are Courts of Record, as the Court of Quarter Sessions and the Court of Oyer and Terminer." That was a case of a contempt committed out of court, by publishing, contrary to the order of the

(1) Wilmot's Op. 243, 254.

(2) By 9 & 10 Vict. c. 95, ss. 1 & 2, the county courts are established, and by s. 3 they are made courts of record. By s. 113: "If any person shall wilfully insult the judge or any juror, or any bailiff, clerk, or officer of the said court, for the time being, during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison to which he has power to commit offenders under this Act, for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding five pounds for every such offence, and, in default of payment thereof, to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid."

By s. 114: "If any officer or bailiff of any court holden under this Act shall be assaulted while in the execution of his duty, or if any rescue shall be made or attempted to be made of any goods levied under process of the court, the person so offending shall be liable to a fine not exceeding five pounds, to be recovered by order of the court, or before a justice of the peace as hereinafter provided."

(3) 2 C. M. & R. 525.

(4) 5 B. & S. 299; 33 L. J. (M.C.) 142.

(5) 7 B. & Ald. 218, at p. 233.

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Court, an account of prosecutions pending in the court of gaol delivery for Newgate; and the Court of Queen's Bench held that the court, which is an inferior court of record, had power to fine for the contempt, and discharged the rule for a certiorari to quash the order inflicting the fine. That case is, therefore, in point. So also is the case of *Re Crawford.* (1) *Ex parte Fernandez* (2) and *McDermott* v. *Beaumont* (3) may also be referred to.

[COCKBURN, C.J. All the cases cited were cases of contempt in court; or, if not, the court was a Superior Court of Record.]

In *Rex* v. *Clement* (4) the court is called the court below; and Holroyd, J., expressly refers to the point of the power of an inferior court of record, in the passage already cited.

[COCKBURN, C.J. But whatever the general law may be, the power given to county courts is limited expressly by s. 113 to contempts in court. Is not that intended to be the measure of the power of the court as to contempts?

MELLOR, J. Following as it does s. 3, which simply makes the court a court of record.]

If the power of the court is limited to contempts in court, then the County Court has no means of enforcing its process out of court.

Sir J. B. Karslake, Q.C. (*Bullen* with him), in support of the rule. The last point made is answered by reference to s. 114. No presumption can be made in favour of the jurisdiction of an inferior court, though a court of record. The county courts are not even a court of record proceeding by the course of the common law, but they are a court of very limited jurisdiction proceeding by a new mode of procedure: *Owens* v. *Breese.* (5) That the county courts are inferior courts, their jurisdiction being limited, there can be no doubt: *Levy* v. *Moylan.* (6) The power, therefore, of the judge to punish for contempt is limited to the cases of contempt in facie curiæ by s. 113. That this was the express intention of the legislature is shewn by 12 & 13 Vict. c. 101, s. 2, which re-enacts the very words of s. 113, the only change being a power to commit to another class of prison. Sect. 114 corroborates

(1) 13 Q. B. 613; 18 L. J. (Q.B.) 225.
(2) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(3) Law Rep. 2 P. C. 341.
(4) 4 B. & Ald. 218.
(5) 6 Ex. 916; 20 L. J. (Ex.) 359.
(6) 10 C. B. 189; 19 L. J. (C.P.) 308.

this view, as it gives power to the judge to fine for obstructing officers when serving process, &c.; and thus the two sections give all the power necessary for enforcing due administration of justice in the court and its process out of court.

COCKBURN, C.J. The rule must be made absolute. I think that the judge of the county court has no authority to punish for contempt not committed in the face of the Court. It is perfectly true that it is laid down by authority, and reason shews the correctness of the rule, that all courts of record have power to fine and imprison for any contempt committed in the face of the Court; for the power is necessary for the due administration of justice, to prevent the Court being interrupted. But it is quite another thing to say that every inferior court of record shall have power to fine or imprison for contempt of court when that contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge. There are other remedies for such proceedings. The power to commit for contempt is fully gone into by Blackstone and Hawkins; but though this power is recognised in the superior courts, it is nowhere said that an inferior court of record has any power to proceed for contempt out of court; and there is an obvious distinction between the superior courts and other courts of record. In the case of the superior courts at Westminster, which represent the one supreme court of the land, this power was coeval with their original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the aula regis, where it is said the king in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign. But it is a very different matter with respect to the county courts and similar inferior courts. No case is to be found in which such a power has ever been exercised by an inferior court of record, or, at all events, upheld by a decision of the superior courts. Finding, therefore, this distinction, that the superior courts have exercised the power from time immemorial, and that no such power has ever been known to be exercised by an inferior court, that would be sufficient to dis-

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pose of this case. But in fact it is not necessary to go so far as that. The statute itself under which the county courts are constituted points out what was the extent of the power of punishing for contempt intended to be conferred upon them. The legislature had anticipated the probability of contempts and the necessity of giving power to the courts of repressing these contempts when occurring in the court itself; and, accordingly, by s. 113 a power is given to the judge to order into custody till the rising of the court any person guilty of any misconduct in court, or to commit him to prison for any period not exceeding seven days, or to impose upon such offender a fine not exceeding 5*l.*, with the alternative of imprisonment of the same duration in default of payment. But it is said that, although the legislature has thus limited the power to contempt in court, that was not intended to alter the law as to the general jurisdiction of a court of record, as it is possessed by inferior courts, of fine or imprisoning to any extent at their discretion. This would lead to a singular inconsistency. If a contempt were committed in the face of the Court, the judge could only imprison the offender for seven days or fine him 5*l.*, while for a contempt out of court he might fine him several hundreds, or commit him for months, or even years. We therefore must understand the legislature to have confined the power to the instances given and to the extent limited. In either view, therefore, as it seems to me, we must hold the jurisdiction assumed by the judge to be beyond his powers; and the rule for a prohibition must be made absolute.

MELLOR, J. I am of the same opinion. I entirely agree with the Lord Chief Justice on both points. The superior courts at Westminster have for all time had this power. In 2 Hawkins P. C. (8th ed.), p. 1, bk. 2, c. 1, it is said the old jurisdiction of the one supreme court was introduced after the Conquest, in which the grand justiciary acted as viceroy; and out of this court was erected the Courts of Queen's Bench, Common Pleas, and Exchequer; and therefore the foundation of the authority of these courts, as to contempts committed in court and contempts out of court having a tendency to affect the administration of justice, was that they were part of the great court or aula regis. The autho-

rity of the inferior courts of record has no such foundation; the matter stands on quite a different footing as to them; and no instance has been found where this power has been assumed or justified by any decision, otherwise than for contempt committed in the face of the Court. When, therefore, the statute makes the county courts courts of record, and protection is afforded by the statute against contempt committed in court, and the limit of the jurisdiction is defined by s. 113, the intention is clearly shewn of confining the jurisdiction to contempt in the face of the Court, leaving what may be called contempt out of court to be punished by the general law, by indictment or otherwise. And that this is the intention is further fortified by s. 114, which gives a summary remedy against certain acts which would be contempts of court, and confines this remedy to the protection of the officers. It clearly would have been unnecessary to give this summary power to the court of inflicting a fine for interference with the process of the court had it been intended or supposed that the county court, as an inferior court of record, had the general authority which the superior courts have.

QUAIN, J. I am of the same opinion. As soon as it is ascertained that no case can be found in which imprisonment or fine has been inflicted by an inferior court of record for contempt not in the face of the Court, it follows that the rule must be made absolute. Such a power has not been given to the county courts by statute, but it is contended that it is not taken away. I should doubt whether, if such a power did exist, it could be taken away except by express words. But no authority is to be found for the existence of any such power in an inferior court of record. The superior courts have always had the power of proceeding for contempt not committed in court. They had it, as Wilmot, C.J., points out, by immemorial usage. (1) There were also many inferior courts of record, but no single instance is to be found of the exercise of this power by them. In 4 Blackstone's Commentaries, p. 283, this immemorial power is expressly confined to the superior courts: "To this head of summary proceedings may also be properly referred the method, immemorially used by the *superior*

(1) See Wilmot's Op. at p. 254.

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courts of justice, of punishing contempts by attachment, and subsequent proceedings thereon." Then at p. 285 instances are given: "Some of these contempts may arise in face of the Court; . . . others . . . by speaking or writing contemptuously of the Court or judges acting in their judicial capacity." And then at p. 286 it is said: "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the *supreme* courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon any superior tribunal. Accordingly we find it actually exercised as early as the annals of our laws extend." In 2 Hawkins, P. C., p. 93 (8th ed.), bk. 2, c. 10, s. 15, when speaking of the sheriff's torn, it is said: "It seems clear that the sheriff's power in this court is still the same it anciently was in all cases not within either of the statutes Magna Charta or 1 Ed. 4, c. 2, from whence it follows that he still continues a judge of record, and may impose a fine on all such as are guilty of any contempt *in the face of the Court.*" There the power of the sheriff as a judge of a court of record is expressly confined to contempt in the face of the Court; and there is no reason why the power of one inferior court of record should be greater than that of another. The power is therefore not inherent in the county courts as courts of record, and it is not given by the statutes, which only makes them courts of record and gives them limited power over contempts in court.

Rule absolute.

Attorney for applicant: *R. D. Hughes, for J. R. Jolliffe, Crewkerne.*

Attorney for defendant: *J. B. Lefroy.*

McGOWAN AND COMPANY, LIMITED, *v.* DYER. 1873 *Feb.* 17.

Principal and Agent—How far a Company is affected by Fraud of its Managing Director—Assignment of Debt—Appropriation of Debt to Payment of Bill.

The plaintiffs, a limited company, of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was being sold on commission by S. The plaintiffs, represented by C., refused to go on printing without a guarantee, and the defendant consented to become security by drawing a bill on D. & Co. and indorsing it to the plaintiffs, upon the understanding that he was to have funds to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co. on his own account, and held their acceptance to his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son, and under this order C. obtained the amount due from S. to D. & Co. and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiffs having sued defendant on his bill:—

Held, that the defendant had no defence as against the plaintiffs; for that the plaintiffs were not responsible for what C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them.

DECLARATION on a bill of exchange at one month for 34*l.*, drawn by the defendant to his own order on Dyer & Co. and indorsed by defendant to plaintiffs; allegation of due presentment for payment and notice to defendant of dishonour.

The only material plea was the 4th, on equitable grounds, on which issue was joined.

At the trial, at the sittings in Middlesex after Hilary Term, 1872, Blackburn, J., held that this plea was not proved, and directed a verdict for the plaintiffs.

The plea and facts are fully set out in the judgment of the Court.

A rule was afterwards obtained for a new trial, on the ground that there was evidence in support of the 4th plea.

May 25, 1872. *C. Marshall Griffith* shewed cause. He contended that there was no sufficient evidence that Christie was a party to or had any knowledge of the arrangement that the defendant's bill was to be met by the proceeds of Messrs. Smith's account. But

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conceding that there was some evidence of this fact, still the 4th plea was not proved, inasmuch as it was a private bill of Christie's that was paid out of Smith's account, and the most material allegation in the 4th plea, that the plaintiffs received the money, was wholly disproved. Although Christie was managing director of the plaintiffs' company, what he did on his private account could not affect the plaintiffs.

June 3. *G. Shaw* in support of the rule. He contended that there was, in equity, a valid assignment or appropriation of the money becoming due from Smiths, although there was no notice to them; and that as between Dyer & Co., the assignors, and the defendant, the assignee, this was a binding assignment; and also as against the plaintiffs, who had notice through Christie; for there was clearly evidence for the jury, notwithstanding his denial, that he was a party to the arrangement. The money, therefore, that was received by Christie from the Smiths, having been thus appropriated to the defendant's bill, must be taken to have been received on account of that bill, as it could not be appropriated to any other debt as between the parties who had notice of the appropriation. He cited 2 Spence on Ch. Jur. pp. 852, 856, 858; *Tibbits* v. *George* (1); *Row* v. *Dawson* (2); *Whitfield* v. *Fausset* (3); *Malcolm* v. *Scott* (4); *Rodick* v. *Gandell* (5); *Morrell* v. *Wootten* (6); *Burn* v. *Carvalho* (7); *Steele* v. *Stuart.* (8)

Cur. adv. vult.

Feb. 17. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

Blackburn, J. This was an action on a bill of exchange, drawn by the defendant on, and accepted by, Dyer & Co., for payment of 34*l.* 0s. 6*d.* at one month, and indorsed by the defendant to the plaintiffs.

The material plea was the 4th, which was pleaded on equitable grounds, and which stated in substance that the bill was drawn

(1) 5 A. & E. 107, 115, 116.
(2) 1 Ves. Sen. 331, 332.
(3) 1 Ves. Sen. at p. 391.
(4) 3 Hare, at p. 52.
(5) 12 Beav. at p. 329; 19 L. J. (Ch.) at p. 120.
(6) 16 Beav. at p. 203.
(7) 4 My. & Cr. at p. 702.
(8) Law Rep. 2 Eq. 84.

and indorsed by the defendant, as surety for Dyer & Co., the acceptors, a firm consisting of W. S. Dyer, A'Beckett, and Hume, to secure a debt due from that firm to the plaintiffs; that the defendant was induced to draw and indorse the bill by the promise of Dyer & Co., that a sum of money which would become due from Smith & Son to Dyer & Co., exceeding the amount of the bill, and which would be payable at the time when the bill would become due, should be appropriated to payment of the bill; that the plaintiffs had notice of these facts; that after the maturity of the bill, Hume, with the privity and at the request of the plaintiffs, and without the knowledge or consent of the other partners in the firm of Dyer & Co., or of the defendant, obtained from Smith & Son the said debt, and paid it to the plaintiffs in discharge of another and different claim; and that the plaintiffs knew that the money was so obtained and applied without the authority or consent of the other members of the firm of Dyer & Co., or of the defendant.

Upon the trial before me it appeared that the plaintiffs' company, of which one Christie was the managing director, had commenced printing for Dyer & Co., a firm consisting of W. S. Dyer (the defendant's son), Hume, and A'Beckett, a periodical which was to be sold by Smith & Son on commission, and that Christie, as representing the plaintiffs, had refused to go on with the work upon further credit without a guarantee, in consequence of which the bill in question was given as a security for work to be done, and which afterwards was done for Dyer & Co. It also appeared that Christie, prior to taking the bill in question, had lent on his private account a sum of money to Dyer & Co., for which he held their acceptance to a draft drawn in his own name; that when the latter was about to fall due, Hume and A'Beckett, without the knowledge of Dyer, jun., or of the defendant, gave to Christie, for payment of the latter bill, an order on Smith & Son, under which Christie obtained the amount of Smith & Son's debt to Dyer & Co., being more than the bill sued on, and applied it to the bill which he held in his own right.

Thus far the facts were not disputed. But it was further proved by Dyer, jun., on behalf of the defendant, that when Christie refused to give further credit, he (Dyer) proposed to make over to

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the plaintiffs Smith & Son's account, so that they might receive the proceeds of the sale, but that Christie objected to this arrangement as being out of the ordinary course of business, and suggested that he (Dyer) should get his father (the defendant) to become surety and let him collect the money from Smith & Son, and so cover his liability; that he therefore applied to his father to draw the bill in question, telling him what Christie had said, and that his father consented to give the bill upon the understanding that he was to have funds to meet it out of Smith's account.

The defendant corroborated this statement, and added that after the interview with his son he went to Christie and told him of the arrangement he had made, and that he had upon these terms consented to give the bill. Upon this part of the case there was a conflict between Christie and the defendant and Dyer, jun., Christie denying that he had any knowledge of the arrangement.

I was of opinion at the trial, first, that there was no evidence of any such arrangement between the defendant and the firm of Dyer & Co., so brought to the notice of Christie, the managing director of plaintiffs' company, as to make it inequitable in Christie to receive payment of his own debt from Dyer & Co. out of the money due to them from Smiths. And, secondly, that though (if there was such an arrangement) the effect might be to make Christie liable personally to the defendant, it could not affect the right of the plaintiffs (the company) to recover, the act of Christie, in taking payment of his own debt, being in no way done for the company, or in pursuance of any authority, express or implied, from them.

I directed the verdict for the plaintiffs, leaving no question to the jury, and therefore the question on this rule for the Court is, whether there was any evidence proper to be left to the jury in support of the defendant's plea.

If the first point had been the only one in the case, we should probably have granted a new trial on the ground that the evidence was such that the opinion of the jury should have been taken on that point; but on the second point we agree that there is not any reason for holding the company responsible for the manner in which Christie received payment of his own private debt, though he happened also to be their managing director.

In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit "for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them." He then proceeds, in s. 456: "But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit."

Christie, as managing director, had a most extensive authority to act for the company, and we do not at all question that the company must be bound by every act of his when acting for them within the scope of that extensive authority. But what he did here was in his private capacity, receiving payment of his own individual debt, and, extensive as his authority was, that act did not come within it. We see no principle on which the company should be liable for what he did, any more than an ordinary employer would be answerable for the act of his agent not acting within the scope of his authority.

It could not be said, if goods or funds pledged to a surety were improperly taken by a person acting for himself, that the surety would be discharged if it could be shewn that the wrongdoer was a clerk or other agent of the principal creditor, though not acting in any way for his employer when he did the wrongful act, nor in pursuance of any authority, express or implied, from him.

The case would have been quite different if the loan from Christie, though in his own name, had really been on behalf of the company; but of that there was no evidence.

We agree, therefore, that the rule should be discharged.

Rule discharged.

Attorney for plaintiffs: *Michael.*

Attorneys for defendants: *Guillaume & Son.*

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Jan. 27.

THE QUEEN *v.* SMITH AND OTHERS, JUSTICES OF LANCASHIRE.

Beer-house—Wine and Beerhouse Act, 1869—(32 & 33 *Vict. c.* 27) *s.* 8—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 75, *sch.* 2—*Appeal to Quarter Sessions*—9 *Geo.* 4, *c.* 61, *ss.* 27–29—*Mandamus.*

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8, "all the provisions (ss. 27–29) of 9 Geo. 4, c. 61, as to appeal (to quarter sessions) from any act of any justice, shall, as far as may be, have effect with respect to the grant of certificates under this Act." By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, and sch. 2, ss. 27–29 of 9 Geo. 4, c. 61, are repealed, "except in so far as the sections relate to the renewal or transfer of licences under ss. 4 and 14 of the same Act:"—

Held, that, as s. 8 of 32 & 33 Vict. c. 27, was left wholly unrepealed, the appeal given under that section by reference to ss. 27–29 of 9 Geo. 4, c. 61, remained, notwithstanding the repeal of those sections.

Therefore, justices having refused a certificate for a licence to sell beer, &c., not to be consumed on the premises, on other grounds than those prescribed by s. 8 of 32 & 33 Vict. c. 27, the Court refused a mandamus on the ground that the applicant might have appealed to quarter sessions.

RULE calling on William Smith and others, justices acting for the Southport petty sessional division of the County of Lancaster, to shew cause why a writ of mandamus should not issue commanding them to hold a special session for the purpose of hearing and determining the matter of an application by Henry Fowle, for a certificate to sell beer, wines, and sweets, not to be consumed on the premises.

An application for a certificate was made at the general annual licensing meeting in September, 1872, and the certificate was refused by the justices, but not on either of the four grounds mentioned in s. 8 of 32 & 33 Vict. c. 27. (1)

A. L. Smith, shewed cause. It must be admitted that the justices were wrong in refusing the certificate; but they contend that the

(1) By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8, "All the provisions of the Act of 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons by (sic) whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises, shall be re-

applicant had a remedy by appeal, and if so, the Court will not interfere by mandamus. By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8, all the provisions of 9 Geo. 4, c. 61, "as to appeals from any act of any justice, shall, as far as may be, have effect with regard to grants of certificates under this Act." The appeal clauses of 9 Geo. 4, c. 61, are ss. 27–29. It is true these sections are repealed, except as to renewal or transfer of certain licences, by s. 75 and sch. 2 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). But while repealing those sections of the Act of Geo. 4, the statute, by s. 75, makes the Wine and Beerhouse Act perpetual, and although it repeals certain sections of 32 & 33 Vict. c. 27, it leaves s. 8 untouched. The right of appeal, therefore, which was given under that section by the incorporation of ss. 27–29 of 9 Geo. 4, c. 61, into that section, remains. It was decided in *Reg.* v. *Stock* (2), and *Reg.* v *Merionethshire* (3), that the repeal of a statute or part of a statute, which has been incorporated in a subsequent statute, does not repeal it so far as the incorporation.

[COCKBURN, C.J. In that case the words of incorporation were much stronger than in s. 8.

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fused, except upon one or more of the following grounds, viz." (1). That the applicant has failed to produce satisfactory evidence of good character. (2). That the house is of a disorderly character. (3). That, the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct. (4). That the applicant, or the house, is not duly qualified.

By ss. 27–29 of 9 Geo. 4, c. 61, "Any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this Act, may appeal against such act to the next general or quarter sessions," &c.; and certain formalities and proceedings are to be observed and taken with respect to such appeals.

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, "The several Acts set forth in the second schedule hereto shall be repealed to the extent to which such Acts are therein expressed to be repealed, and in particular there shall be repealed so much of the Wine and Beerhouse Acts as makes such Acts temporary in their duration, and the said Acts shall henceforth be perpetual."

By sch. 2, many sections of 9 Geo. 4, c. 61, are repealed, amongst them ss. 27–29, "except in so far as the three last-mentioned sections relate to the renewal of licences or to the transfer of licences under ss. 4 and 14 of the same Act;" and certain sections or parts of sections of 32 & 33 Vict. c. 27, are also repealed, but s. 8 is not mentioned.

(2) 8 A. & E. 405.

(3) 6 Q. B. 343.

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QUAIN, J., referred to *Boden* v. *Smith.* (1)]

Saying that certain sections "shall have effect," with regard to certain things, is equivalent to re-enacting or incorporating the sections. [He also referred to *Reg.* v. *Lancashire* (2); *Reg.* v. *Pilgrim* (3); *Reg.* v. *Brecon* (4); and *Reg.* v. *Surrey.* (5)]

J. Paterson, in support of the rule. The cases relied on were decided on a very different form of words. Conceding that, in general, where enactments of a former Act are incorporated in a subsequent Act, the repeal of the first Act leaves them still operative in the subsequent Act, yet that must depend very much on the repealing statute. Now here it is to be observed that the Licensing Act, 1872 (35 & 36 Vict. c. 94) is an Act consolidating all the Acts in pari materia, so that the whole series must be considered as one statute; and on a repeal of the original sections giving an appeal the incorporating sections must fall with them, and it was unnecessary therefore expressly to repeal that part of s. 8.

[BLACKBURN, J. It is to be remarked, however, that in this very schedule, in the case of 4 & 5 Wm. 4, c. 85, when the incorporating section is intended to be repealed, it is so said expressly, "So much of s. 11 as incorporates or applies any repealed enactment."]

If the appeal remains in this case, the anomaly will follow that in the case of alehouses, &c., there will be no appeal, except on some renewals, while in all cases of wine and beerhouses there will be an appeal; whereas it was clearly the intention of the legislature to put both classes on the same footing.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The rule is for a mandamus to justices to hear an application for a certificate for a licence to sell beer, &c., not to be drank on the premises, and it is admitted that they were wrong in refusing it on any other ground than the four grounds mentioned in s. 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27). But it has been contended, on behalf of the justices, that this refusal on their part to grant a certificate was

(1) 18 L. J. (C.P.) 121.
(2) Law Rep. 6 Q. B. 97.
(3) Law Rep. 6 Q. B. 89.
(4) 15 Q. B. 813; 18 L. J. (M.C.) 123.
(5) Law Rep. 5 Q. B. 87.

matter of appeal to quarter sessions, and that therefore, as the party aggrieved had a remedy in that form, this Court, according to the general rule, will not grant a mandamus. Consequently the question comes to be, whether there was an appeal to quarter sessions in this case; and that depends on whether the right of appeal which is given in s. 8, by reference to the appeal sections (ss. 27–29) of 9 Geo. 4, c. 61, is taken away by the repeal in s. 75 and sch. 2 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). There is no doubt the schedule professes to repeal the appeal sections of 9 Geo. 4, c. 61, except in certain cases not material for the present point; but the question is, whether those sections of 9 Geo. 4 have been so incorporated into s. 8 of the Act of 1869 as to leave the right of appeal so given by incorporation untouched, although the original sections are themselves repealed. The authorities referred to clearly establish that when a prior Act, or part of a prior Act, is incorporated with a subsequent Act, it is the same thing as if the words of the first Act had been repeated in the second Act; and the repeal of the first Act will not take away the effect of the words which are so repeated in the second Act by incorporation. The difficulty here arises from the usual form of incorporation having been departed from; but I think the form used does constructively, though not expressly, say, that the appeal sections shall be incorporated, and that an enactment that the provisions of 9 Geo. 4, c. 61, as to appeal, shall "have effect with regard to grants of certificates under this Act," is the same thing in effect as though it had been said, "the provisions of the Act of Geo. 4, as to appeal, shall be introduced into this Act." This view is fortified by the case of *Boden* v. *Smith* (1), in which the form of words "shall be taken to apply" was held a sufficient form of incorporation. I think, therefore, in the present case, the words in s. 8 are sufficient to keep alive the sections of 9 Geo. 4 just as much as if the stronger words, "shall form part of this Act," had been used. The only other argument against this view was, that the intention of the legislature must be taken to have been to do away with the appeal under the statute of Geo. 4 for all purposes, except so far as it is expressly retained in the schedule, inasmuch as the Acts all related to the same subject matter. I do not

(1) 18 L. J. (C.P.) 121.

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think much weight can be given to this argument, though I must say a more puzzling and confusing mode of dealing with an intricate matter I never met with. Upon the whole, however, I think the principle is sound, that when an Act, or part of an Act, is incorporated by any form of words in a subsequent Act, the repeal of the first Act does not repeal the part incorporated in the second Act, without express words to that effect. The consequence is that the appeal is not taken away; and as the applicant had his remedy by appeal, the Court will not grant him a mandamus.

BLACKBURN, J. I am of the same opinion, though I cannot say it is a clear opinion, for it is impossible to say anything is clear about these Acts of Parliament. When it is proposed to consolidate the law on any subject, the proper mode of dealing with it is to repeal all the former Acts, and re-enact so much of them as it is thought ought to be retained in direct and plain and simple language. But the practice has been of late years to repeal part of an Act and incorporate the remainder with the new Act, and to repeat this process whenever fresh legislation is thought necessary. By this process in the present case we have fifteen Acts more or less on the same subject; and then the new licensing Act is passed, which repeals three or four of the old Acts in toto, and of the remaining eleven or twelve certain sections are repealed, some in whole, some in part; so that we have fragments of twelve Acts, besides the new one, all more or less in force. The particular thing we have to decide after this legislation, on the present occasion is, whether the provision of 9 Geo. 4, c. 61, s. 27,—which says that "any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act, may appeal to the next Quarter Sessions,"—remains unrepealed with regard to proceedings under 32 & 33 Vict. c. 27. Sect. 8 of that Act says that all the provisions of 9 Geo. 4, c. 61, "as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act." That is equivalent to saying that there shall be an appeal under the new Act with all the conditions mentioned in ss. 27–29 of the Act of Geo. 4. The Act of 32 & 33 Vict. was only temporary, but by 35 & 36 Vict. c. 94, s. 75, it is made perpetual, and then by that section and sch. 2,

certain statutes and sections are repealed; and among others ss. 27–29 of 9 Geo. 4, c. 61 are repealed, except so far as they relate to the renewal or transfer of licences under ss. 4 and 14 of that Act. That undoubtedly takes away any right of appeal in proceedings under 9 Geo. 4, c. 61, in all but the excepted cases. But is the appeal in cases under 32 & 33 Vict. done away with also? The statute certainly does not expressly say so: it may have been meant to do away with all appeals, or it may not have been meant. I agree that the authorities shew that the repeal of the original Act does not of itself repeal provisions as incorporated in a subsequent Act; and without authorities it is but common sense, that where a second Act in effect re-enacts an older Act, the second Act must be expressly repealed as well as the older Act, or it must be taken to remain in force. The enactment in s. 8 is not that the provisions of the Act of Geo. 4 as to appeals, so long as they are in force shall apply, but that they shall have effect, as far as may be, with regard to grants of certificates under this Act. That is, in cases under the new Act there shall be an appeal with similar restrictions to those under the old Act. The last statute, though it repeals the sections as to appeal of the Act of Geo. 4, when dealing with 32 & 33 Vict. c. 27, says nothing as to the clause in s. 8, which incorporates those sections of the Act of Geo. 4; but it is singular that when the schedule is dealing with 4 & 5 Wm. 4, c. 85, it repeals "so much of s. 11 as incorporates or applies any repealed enactment." That is perfectly intelligible, and if when they came to 32 & 33 Vict. c. 27, they had said, "so much of s. 8 as incorporates or applies any repealed enactment," the present question would not have been argued. They have not said so; so that we are left in doubt as to what was intended; but the obvious inference must be that they did not intend to repeal the incorporating part of s. 8.

MELLOR, J. I confess I have some difficulty in the case. But on the whole it appears to me that although the appeal sections of 9 Geo. 4, c. 61 are repealed, in general, as to any proceedings under the statute itself, yet as s. 8 of the Act of Vict. is left untouched, they still subsist and have effect with regard to that statute.

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QUAIN, J. I am of the same opinion. I can give no other effect to s. 8 of 32 & 33 Vict. c. 27, than that it incorporates the appeal sections of 9 Geo. 4, c. 61; and it amounts to the same thing as if the words of ss. 27–29 had been repeated and made part of s. 8. And if so, s. 8 being untouched, the appeal remains in cases under that Act. Mr. Paterson said, that we must look at the scope of the Act of 1872; and looking at the whole Act, it deals with the whole legislation on this matter, and therefore not only the older Acts but the Act of 1869 are at once incorporated; and the intention was to put all classes of licensed houses on the same footing, and that it would be strange if an appeal were allowed in all cases of wine and beerhouse certificates and not in all cases of alehouses, &c. That may or may not be so. I think other and greater anomalies might be pointed out. However, the question is not what the legislature may have intended so much as, what have the legislature expressed? By s. 75 of the Act of 1872, there is what amounts to an actual re-enactment of all the sections of the Act of 1869 which are not touched in the schedule, by virtue of making the statute perpetual. Then by the schedule ss. 27–29 of the Act of Geo. 4 are repealed; and s. 8 of the Act of 1869 is left wholly untouched. Can the repeal of sections 27–29 affect s. 8? My Brother Blackburn has pointed out that when dealing with 4 & 5 Wm. 4, c. 85, the intention is expressly shown of repealing not only the sections of the original Act, but also the sections as incorporated in the later Act, by the words "so much of s. 11 as incorporates or applies any repealed enactment;" and I may add, the same form of words is used in the schedule in two other instances, viz. 11 Geo. 4 & 1 Wm. 4, c. 64, and 3 & 4 Vict. c. 61. I cannot therefore come to any other conclusion than that the appeal remains.

Rule discharged without costs.

Attorneys for applicant: *Bailey, Shaw, Smith, & Bailey.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Welsby & Hill, Southport.*

IN THE MATTER OF MARY ELLEN ANDREWS (AN INFANT). 1873 Feb. 5.

Testamentary Guardian under 12 *Car.* 2, *c.* 24, *s.* 8—*Right to Custody of Ward —Habeas Corpus—Discretion of Court—Validity of Appointment.*

A person, who has been duly appointed under 12 Car. 2, c. 24, s. 8, by the will of a father to be guardian of his child, stands in loco parentis, and having, therefore, a legal right to the custody of the infant, may, in order to obtain possession of such ward, claim a writ of habeas corpus, which a common law court has no discretion to refuse, if the applicant be a fit person and the child too young to choose for itself.

Where, however, the validity of the testamentary appointment is disputed, the Court will direct an issue to be tried by a jury in order to establish the same.

MOTION for a rule calling upon Mary Fleetcroft to shew cause why a writ of habeas corpus should not issue directing her to bring up the body of Mary Ellen Andrews, an infant, that the latter might be given over to the applicant as her testamentary guardian.

It appeared from the affidavits, that Thomas Andrews, being of the Roman Catholic faith, entered into an ante-nuptial arrangement with Ellen Fleetcroft, a Protestant, whom he was about to wed, that, if there should be issue of their marriage, the males should be educated in the religion of the father, and the females in that of the mother. The intended marriage was solemnized on the 17th of March, 1854; and they had issue a son, who was baptized and brought up as a Roman Catholic, and a daughter, Mary Ellen, the infant in question, who was born on the 22nd of May, 1862. This daughter was, with the assent of her father, baptized a Protestant on the 29th of June, 1862, having Protestant sponsors approved by him.

On the 14th of February, 1863, the father executed, as was alleged, the following document, in the presence of two witnesses, who attested his signature: "I, Thomas Andrews, of Manchester, hereby direct that my children shall be baptized and brought up as members of the Roman Catholic Church, and in the event of my death, I hereby appoint my brother, Joseph Andrews, reporter, the guardian of my children, for the execution of this my request, giving him power, should he see fit, to appoint any other person, being a Roman Catholic, as guardian of my

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children, to act in case of his death, or upon his ceasing voluntarily to discharge the duty, and to adopt any course which he may think proper for carrying out my intentions."

Two days afterwards, viz., on the 16th of February, Thomas Andrews died, possessed of no property whatever. His widow married again. The infant Mary Ellen from the time of her father's death was maintained, and educated by and at the expense of the defendant, Mary Fleetcroft, her grandmother, great affection existing between them. From the age of two years the child had been accustomed to attend a Protestant church, and had been brought up in the principles of the Protestant religion, without interference or objection on the part of any person, until the year 1871, when the applicant, Joseph Andrews, claiming under the alleged testamentary appointment, sought to have the custody of the infant that he might carry out the wishes of her father, and he caused her to be sent to a Roman Catholic school, from which, however, she was afterwards withheld by her grandmother.

The defendant denied the validity of the testamentary paper, and contradictory affidavits were filed by the parties.

Jan. 14. *C. Russell, Q.C.*, in support of the motion. The applicant is entitled to the child. He is her lawful guardian designated in a will, which, purporting to have been duly executed and attested, is valid as a testamentary appointment under 12 Car. 2, c. 24, s. 8 (1): *Ex parte The Earl of Ilchester.* (2) The Court has

(1) 12 Car. 2. c. 24, s. 8, enacts that "where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, that it shall and may be lawful to and for the father of such child or children . . . by his deed executed in his lifetime, or by his last will and testament in writeing, in the presence of two or more credible witnesses, in such manner, and from time to time as he shall respectively thinke fitt to dispose of the custody and tuition of such child or children for and dureing such time as he or they shall respectively remaine under the age of twenty-one yeares, or any lesser time, to any person or persons in possession or remainder, other than Popish recusants, and that such disposition of the custodie of such childe or children . . . shall be good and effectual against all and every person or persons claiming the custody or tuition of such childe or children as guardians in socage or otherwise; and that such person or persons to whom the custody of such childe or children hath beene

(2) 7 Ves. 348.

no discretion to refuse him the writ: *Rex* v. *Isley*. (1) Assuming an ante-nuptial arrangement to have been made such as is suggested, it would nevertheless be revocable, and was revoked by the will. The guardian, who now seeks to carry out the last wishes of the father, is acting bonâ fide, and has been guilty of no laches in waiting until the infant should be of an age at which she might receive instruction. As she is only nine years old, her ideas on religious subjects are not yet fixed, and, therefore, will not be disturbed by the change of tenets.

O'Malley, Q.C., shewed cause in the first instance. This testamentary paper, having no reference to property, has not been admitted to probate, and therefore the validity of the execution is doubtful. There is evidence of an agreement before marriage between the parents of the child, which the Court will not disregard. To suppose that this will is a genuine document, is to conclude that the father, when dying, practised a fraud upon his wife by setting aside the ante-nuptial engagement which she, on her part, had performed, he himself having deliberately assented to the baptism of the child in the Protestant faith. No attempt has been made to act upon the will for eight years.

[COCKBURN, C.J. Nevertheless, assuming its validity, have we discretion to refuse our writ to the guardian?

C. Russell, Q.C, mentioned *Re Meades* (2), in which Lord O'Hagan, C., speaking of an ante-nuptial engagement similar to that relied on in the present case, said: "But that engagement was not of binding force: *Re Browne.* (3)"

COCKBURN, C.J. Possibly not; but does not the fact of its being morally binding give us a discretion here?]

That fact ought surely to give the Court discretion. There is a distinction between the action of the Court in restoring a prisoner to liberty, and in giving up a child to a guardian. The Court of

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or shall be soe disposed or devised as aforesaid, shall and may maintaine an action of ravishment of ward or trespasse against any person or persons which shall wrongfully take away or detaine such child or children, for the recovery of such childe or children, and shall and may recover damages for the same in the said action for the use and benefit of such childe or children."

(1) 5 A. & E. 441.

(2) 5 Ir. Rep. Eq. 98, 111.

(3) 2 Ir. Ch. 151.

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Chancery would, under the present circumstances, disregard the direction in the will: *Hill* v. *Hill.* (1) In *Rex* v. *Isley* (2) the judges of the Queen's Bench assume their right to refuse the writ, Lord Denman, C.J., saying " . . . we should not consider our discretion tied up if there were a reasonable prospect of an order of the Court of Chancery being obtained."

[COCKBURN, C.J. But they acted on the testamentary appointment nevertheless.]

Reg. v. *Clarke* (3) is the leading case on the question of common law jurisdiction over the matter.

[COCKBURN, C.J. The Act of Charles II. places the guardian in loco parentis, enabling him to come to us as the father would and to demand the child. If it would be no answer to the father that he arranged otherwise by a settlement, then it is none to the guardian. We will look into the authorities, and if we find discretion left to us we shall exercise it.

C. Russell, Q.C., referred the Court to *Rex* v. *Greenhill* (4); *Re Hakewill.* (5)]

Cur. adv. vult.

Feb. 5. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Archibald, JJ.) was delivered by

ARCHIBALD, J. We postponed giving judgment in this case in order that we might consider the authorities bearing upon the question whether, assuming the validity of the document appointing the applicant guardian, we have any discretion, under the circumstances, to refuse the writ of habeas corpus or to decline to change the custody of the infant.

The affidavits furnish evidence that before marriage an arrangement was made between the parents of the infant (the father being a Roman Catholic and the mother a Protestant) that the sons of the marriage should be brought up as Roman Catholics and the daughters as Protestants, and for the purpose of our judgment, but without intending in any way to prejudice the inquiry we are about to direct, we assume that such an arrangement was in fact made.

(1) 31 L. J. (Ch.) 505. (3) 7 E. & B. 186; 26 L. J. (Q.B.) 129.
(2) 5 A. & E. 441. (4) 4 A. & E. 624.
(5) 12 C. B. 223.

It also appeared that the child, now about ten years of age, was, with the sanction of the father, baptized as a Protestant; that when she was about a year old she was left, where she now is, in the custody of her maternal grandmother, by whom she has been brought up in the Protestant faith, and at whose expense she has hitherto been maintained and clothed.

The father died on the 16th of February, 1863, having, as alleged, executed, two days before his death, a document purporting to appoint Joseph Francis Andrews guardian of his children, and sufficient, if duly executed, to constitute him guardian under the provisions of the statute 12 Car. 2. c. 24.

There is considerable doubt upon the affidavits as to when the appointment was first brought to the notice either of the mother or grandmother of the child; but it does not appear that any claim to the custody of the child was ever made by the applicant until the year 1871, about eight years after the father's death, and after the child had been left in the care of her grandmother, and maintained and educated at her expense for about the same period. The question which arises is, whether, as a court of common law, we can give any effect to the arrangement made before marriage with respect to the education of the child, and treat it as binding on the guardian who stands (Com. Dig. Guardian (D)) in loco parentis, the admitted object of the present application being, that the child shall henceforth be brought up in the religious faith of the father; or whether we can decline to interfere with the present custody of the child, on the ground suggested that the change proposed would be prejudicial to her interests. In dealing with questions of this nature the Court of Chancery, exerting the prerogative of the sovereign as parens patriæ, has assumed a more extensive authority than that exercised by the common law courts, and although that Court, in making any order as to the custody or education of an infant, pays in general the utmost regard to the rights and wishes, or assumed wishes, of the father as to the custody and education of his child (*Ex parte Skinner* (1), *Hawksworth* v. *Hawksworth* (2)), still, in carrying out what was conceived to be the true interest of an infant, an arrangement similar in effect to that in the present case was upheld by that Court.

(1) 9 I. B. Moore, 278. (2) Law Rep. 6 Ch. 539.

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In the case of *Hill* v. *Hill* (1), a Roman Catholic, who lived until his eldest child was seven, and had allowed the mother, a Protestant, to have exclusive charge of the education of the children during his life, and they with his full knowledge were brought up in the Protestant faith, was held to have abdicated his right to direct their religious education, and in ordering a scheme to be settled for their education the Court disregarded a direction in his will that they should be brought up in the Roman Catholic faith.

The courts of common law, however, have always declined to give effect to any mere arrangement or consent on the part of the father disposing of the custody of his infant child, and have felt bound notwithstanding, to enforce the right of the father when asserted.

In the case of *Reg.* v. *Smith* (2), it was held by Erle, J., in the Bail Court, that a contract, by the father of a child with a third person that the latter should have the custody of the child, was in the nature of a mere consent and might be revoked by the father, and that he was entitled by a habeas corpus to have the child delivered over to him.

Indeed, it appears to have been the invariable practice of the common law courts on an application for a habeas corpus, to bring up the body of a child detained from the father (and the case would be the same as to a testamentary guardian) to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination, in consequence of his immorality or gross profligacy.

If the infant be of an age to elect for itself, the Court will merely interfere so far as to get it free from illegal restraint without handing it over to anybody. This was the course adopted in *Rex* v. *Delaval* (3), in the case of a girl eighteen years of age, who was delivered from a custody considered illegal, and left at liberty to go where she pleased. But in the absence of any right of choice, the Court goes further, and transfers the infant to the proper legal custody.

(1) 31 L. J. (Ch.) 705. (2) 22 L. J. (Q.B.) 11[illegible]

(3) 3 Burr. 1435.

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The right to such an election, it has now been clearly decided, depends upon age alone, and not on mental capacity: see *Reg.* v. *Clarke* (1), and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen: *Reg.* v. *Howes* (2), followed by the Court of Probate and Divorce, in the cases of *Cartlidge* v. *Cartlidge* (3) and *Mallinson* v. *Mallinson.* (4)

The principle on which this court acts in handing over to the parent or guardian an infant too young to make a choice as to its custody, is well explained by Coleridge, J., in *Rex* v. *Greenhill.* (5) He says, "Where the person is too young to have a choice, we must refer to legal priciples to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists: and where the child is in the hands of a third person, that presumption is in favour of the father. But although the first presumption is that the right custody, according to law, is also the free custody, yet if it be shewn that cruelty or corruption is to be apprehended from the father a counter presumption arises."

These views were adopted and acted on by this Court in the subsequent case of *Rex* v. *Isley* (6), where upon a habeas corpus obtained by testamentary guardians appointed by the father's will, two children, too young to make choice for themselves, were removed from the custody of the grandfather and grandmother, and directed to be handed over to the guardians, although the grandparents had, at the request of the father, on the occasion of his wife's death, come over from America at considerable inconvenience and sacrifice and settled in England, for the express purpose of taking care of the children, who had continued under their care for a period of about four years.

The same rule as to the paramount right of the father in the view of a court of common law, was also strongly expressed by the Court of Common Pleas in the case of *Re Hakewill* (7), and

(1) 7 E. & B. 186; 26 L. J. (Q. B.) 169. 3 Jur. N.S. 335.
(2) 3 E. & E. 332; 30 L. J. (M.C.) 47.
(3) 2 Sw. & Tr. 567; 31 L. J. (P. & M.) 85.
(4) Law Rep. 1 P. & M. 221.
(5) 4 A. & E. 621, at p. 643.
(6) 5 A. & E. 441.
(7) 12 C. B. 223.

(2 S.C.) 7 Jur. N.S. 22.

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fully approved by this Court in the case of *Reg.* v. *Clarke* (1), already cited. It is with great regret, that we therefore feel ourselves bound to hold, that, assuming the validity of the guardian's appointment, and notwithstanding the lateness of the application, and the apparent harshness of such a proceeding towards the grandmother of the child, we have no discretion to refuse the writ, and we should be bound to hand over the child to the custody of the guardian, as the only custody legally free from restraint.

The affidavits, however, disclose circumstances which give rise to doubts as to the validity of the document by which the applicant was appointed, and as we cannot undertake to decide that question upon the affidavits, we have come to the conclusion that an issue must be directed, and that question submitted to a jury.

Rule accordingly. (2)

Attorneys for applicant: *Chester, Urquhart & Co.*
Attorneys for respondents: *Nisbet & Co.*

(1) 7 E. & B. 186; 26 L. J. (Q.B.) 169.

(2) An injunction has since been granted by Malins, V.C., to restrain the guardian from interfering with the education of the child: *Andrews* v. *Salt*, Weekly Notes, Feb. 22, 1873; and the case is now under appeal.

Approved. GRANT *v.* SUN SHIPPING CO., LTD. [1948] 2 All E.R. 238.

[IN THE EXCHEQUER CHAMBER.]

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Feb. 3.

GEE *v.* THE METROPOLITAN RAILWAY COMPANY.

Railway Company — Negligence—Evidence of Defendants' Liability — Contributory Negligence—Nonsuit.

In an action against the defendants for negligence it was proved that the plaintiff, being a passenger on defendants' railway, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The jury having found for the plaintiff, leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendants' liability:—

Held, by the Queen's Bench and Exchequer Chamber, that there was evidence, and that the verdict ought to stand.

Quære, how far the question of contributory negligence is open in such cases.

Adams v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 4 C. P. 739) questioned.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants or a nonsuit.

Declaration that the plaintiff was a passenger on defendants' railway to be safely carried; that defendants so negligently conducted themselves in carrying plaintiff and managing the carriage in which plaintiff travelled, that plaintiff fell out and was injured.

Plea, not guilty; issue joined.

The following is the substance of the case, as stated on appeal:—

At the trial before Cockburn, C.J., at the sittings in Middlesex, after Trinity Term, 1871, the following facts were proved:—

On the 10th of January, 1870, the plaintiff, in company with his brother, took a second-class ticket from the Victoria Station to the Aldersgate Street Station, on the Metropolitan Railway. The plaintiff and his brother entered an empty compartment of a second class carriage of a train of the defendants at the Victoria Station, which had come from Westminster and was about to start for the Aldersgate Street Station. The plaintiff's brother seated himself on the left hand, or near side of the carriage, and the plaintiff on the right hand side, or off side, nearest the six-foot way.

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Across the windows of the carriages in use on the railway there is a small brass rod, or bar.

Some conversation having arisen between the plaintiff and his brother with respect to the mode of signalling in use on the defendants' railway, as the train was approaching the Sloane Square Station, the plaintiff stood up, with the intention of observing the signal lights at the station.

The following was the plaintiff's evidence in chief:—"I said to my brother, 'If you look out when I tell you, you will see the lights for Sloane Square.' I stood up and took hold of the small brass bar across the window of the off-side door of the carriage. It immediately flew open as soon as I touched the bar. My purpose in looking out was to see and to tell my brother when the lights were in view so that I could see them. As soon as I took hold of the bar and leant a little forward the door flew open and I fell out; as soon as I leant on it the door flew open. I tried to get hold of the bar on which I placed my hands, but I could not. The door could not have been fastened. I went on to the foot-board of the carriage first. I could not sustain myself, and fell on to the ground on my right side. How long I was there I do not know, I can give no idea of the time; I can remember falling, and then I remember someone falling over me; that is the first recollection I remember. That was after the train had left. It was my brother; he moved me out of the way, and then came back for some one. We were in the tunnel when I fell out. It was some short distance from the Sloane Square Station where I fell out; before we quite reached it. One of the men asked me how I had fallen out. I told him that I had simply leant against the door, and the door had given way with me. He said it was the fault of those fellows at Westminster; there would be a devil of a row about it. If the train I came by had returned, the side on which I was then would have been the near side next the platform. Two of the company's people assisted me to the Sloane Square Station."

On cross-examination:—"I got up for the purpose of seeing the signal lights. I took hold of the cross bar that is across the window; I was going to look out. My object was to put my head out sufficiently to see the lights. When I looked over the bar I was holding it specially to see the light, and I pressed

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with my hands against it slightly. I was standing, and took hold of the bar, and leaning slightly; my brother was still sitting at the other side of the carriage. The bar did not break, to the best of my knowledge; I do not remember its breaking; I am quite sure it did not break. I heard some things that my brother said; I think I heard nearly all he said at Sloane Square. I never heard him say that I had got hold of the bar, and that the bar broke. Having hold of the bar the door gave way, and then I tumbled out. I did not try to look out on that side before I stood up. I said, 'If you will look out when I tell you to look out, you will see the signals;' I think that was the expression. I was going to look out; I was accustomed to the line; I was explaining to him, to the best of my ability, the system of signalling on the line, and I said to him, 'If you look out when I tell you, you will see the lights for Sloane Square.' And then I put my hand on the bar and fell out; that was the way in which it was done."

There was no further evidence given as to the condition of the door or its fastenings from the time the train left Westminster till the time of the accident, nor as to whether it was totally unfastened or only imperfectly fastened.

At the conclusion of the plaintiff's case, it was submitted on behalf of the defendants, that the plaintiff was not entitled to recover, and the Chief Justice reserved to the defendants leave to enter a verdict for them or a nonsuit. The defendants did not offer any evidence, and the plaintiff then had a verdict for 250*l.* (1)

A rule was afterwards obtained to enter the verdict for the defendants or a nonsuit pursuant to the leave reserved, on the ground that there was no evidence of liability of the defendants; or for a new trial, on the ground that the verdict was against the weight of evidence.

Jan. 11, 1872. *Huddleston, Q.C.*, and *L. Kelly*, shewed cause. The proper inference to be drawn from the facts is, that the door of the

(1) The above is the statement in the case on appeal. In the Court of Queen's Bench it appeared that the Chief Justice left two questions to the jury: first, whether there was negligence on the part of the defendants in not properly fastening the door; secondly, whether there was negligence or improper or imprudent conduct on the part of the plaintiff.

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carriage was left unfastened by the defendants' servants; there was therefore primâ facie evidence of negligence on the part of the defendants. The plaintiff was not guilty of contributory negligence; he put his hand on the door, which he had a right to believe was securely fastened, for the purpose of looking out of the window, a perfectly legitimate act, when the door, owing to the neglect of the servants of the company in not having fastened it, flew open, and the plaintiff was injured. The case is distinguishable from *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1). There the plaintiff put himself in peril in attempting to shut the door of the carriage which he knew was open. He voluntarily did an act obviously dangerous. That is a totally different case from the present.

M. Chambers, Q.C., and *W. G. Harrison*, in support of rule. The contract of the railway company was safely and securely to carry the plaintiff on a journey from one place to another. If the plaintiff had sat still in his place in the carriage the company would have fulfilled their contract. The company are not responsible for an accident caused by the voluntary acts of a passenger during the journey. The plaintiff must shew that negligence of the defendants was the immediate cause of the injury; whereas it was by the plaintiff's own act that the accident occurred. The damages must legitimately flow from the breach of contract; it cannot be said that by reason of the defendants' negligence the plaintiff was injured; the whole mischief resulted from the plaintiff's own act: *Siner* v. *Great Western Ry. Co.* (2), *Bridges* v. *North London Ry. Co.* (3)

COCKBURN, J. I am of opinion that this rule should be discharged. The facts are simple. The plaintiff and his brother were travelling as passengers on the defendants' railway. In the carriages of that railway there is a bar across the window to prevent persons from putting their heads to more than a small extent out of the window. The plaintiff and his brother had been conversing as to the signals used on the line, and the plaintiff was

(1) Law Rep. 4 C. P. 739.
(2) Law Rep. 3 Ex. 150; in error, Law Rep. 4 Ex. 117.
(3) Law Rep. 6 Q. B. 377.

explaining the mode in which they were worked; and told his brother he would shew him how it was done; and as soon as the lights of the station were visible the plaintiff stood up and put his hand on the rod of the window, and it so happened that the door, having been left insecurely fastened, flew open, and the plaintiff was thrown out and injured. Under these circumstances are the defendants liable? We must take it that there was negligence in not securely fastening the door; but it is said that that negligence alone did not cause the accident; the proximate cause of the accident was the plaintiff pressing against the door. It is said that the duty of the company is to carry a passenger safely as long as he sits quietly in the carriage; and if an accident happens from any act of his inconsistent with the ordinary behaviour of passengers, he has only himself to thank, and the company are not liable. I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey. *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1) was cited for the defendants. That case was decided on a right principle, which was this: that, though the plaintiff was exposed to some inconvenience by the door opening, he ought to have borne that inconvenience, and not put himself in danger. I agree with the judgment of my Brother Brett; he says: "I think on the whole that this was not a proper case to go to the jury, though at the trial I thought there was sufficient evidence for them to act upon: I think the jury were justified in finding that the defendants were negligent; but the immediate result of their negligence was not any peril to the plaintiff, but only considerable inconvenience. It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience. I think here the jury might well find that there was no obvious danger, and that the act was not carelessly

(1) Law Rep. 4 C. P. 739.

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done; but I think the inconvenience was not so great as to make it reasonable for the plaintiff to get rid of it in this way. . . . There was no evidence of the weather being bad, and in three minutes the train would have arrived at the next station. I think therefore there was no great inconvenience; and though the danger was not obvious, I think it could not be said that the act was not dangerous in itself; and, under these circumstances, I think the putting himself into peril was contributory negligence, and that the case, therefore, ought not to have been left to the jury." There the decision turned on the passenger committing an act of imprudence which was uncalled for; that case therefore has no application to the present. Here, assuming that the company had done their duty, the passenger did nothing more than that which came within the scope of his enjoyment while travelling, without committing any imprudence; in passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent but in the ordinary manner of people travelling for pleasure. Here the defendant was simply looking at the signal lights, and there was nothing in his conduct which can be imputed to him as negligence or imprudence.

BLACKBURN, J. I do not agree with the defendants' counsel as to the principle of a railway company's liability. I take it that a railway company are not bound to carry passengers safely and securely, at all events, but to take all reasonable care that in the management of their trains the passenger is not exposed to undue danger. Then was the plaintiff conducting himself in such a way as amounted to a want of ordinary care? As to that, I can only say it was a question for the jury, and they were right in the verdict that they have found. Looking out of the window, though not a necessary act on the part of the passenger, was not an improper act. In *Adams* v. *Lancashire and Yorkshire Railway Co.* (1) the passenger voluntarily incurred a known and ascertained danger. That case is decided on a different principle, for here there was no known or ascertained danger. The essence of this case is that the plaintiff, trusting that the company had

(1) Law Rep. 4 C. P. 739.

done their duty, stood up and looked out of the window, and, by reason of the door being unfastened, fell out and was injured.

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MELLOR, J. I am of the same opinion. I think the case was rightly left to the jury. It seems to me quite clear that the door, by the negligent act of the defendants, was left unfastened; and I do not agree with the defendants' counsel that a passenger must sit still throughout the journey. I am satisfied, therefore, that the rule ought to be discharged. In *Adams* v. *Lancashire and Yorkshire Railway Co.* (1) the leave reserved was on the ground that there was no evidence that the accident was caused by the negligence of the company, and the Court held that it was the result of the imprudent conduct of the plaintiff.

QUAIN, J. I agree that the rule must be discharged. It appears to me that the question is whether the plaintiff knowingly did an act of a perilous nature voluntarily. If he did, the case is governed by *Adams* v. *Lancashire and Yorkshire Railway Co.* (1), if not, the case is distinguishable.

Rule discharged.

Feb. 23, 1873. *W. G. Harrison*, for the defendants on appeal. The question on the point reserved is whether there was evidence of liability of the defendants. (2) First, they were guilty of no negligence; there is no evidence that the lock of the door was out of order; all that was proved was that on being pressed by the plaintiff's body the door flew open. It may have been left open by the defendants' servants, or it may have been opened by a passenger and left improperly fastened between Westminster Station, whence the train started, and the Victoria Station, where the plaintiff got in. And there would be no means of examination by the defendants' servants between these stations, the door being on the off side away from the platform. But, secondly, assuming the mere fact of the door opening as stated to be primâ facie evidence of negligence on the part of the defendants, this negligence was not the cause of the accident;

(1) Law Rep. 4 C. P. 739.

(2) The defendants appealed upon the whole of the rule, if the Court of Exchequer Chamber should think it open to them, but the Court at once intimated that the defendants could only appeal upon the point reserved.

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it was the plaintiff's own act which caused it: *Siner* v. *Great Western Railway Co.* (1) The question, of what has been somewhat wrongly, perhaps, called contributory negligence, is involved in the question of the defendants' liability: *Adams* v. *Lancashire and Yorkshire Railway Co.* (2) That case is directly in point; there, the door having flown open several times, the plaintiff fastened it, and on attempting to fasten it the fourth time he fell out, and the jury found for the plaintiff. The Court overruled the view of Brett, J., at the trial and, with the concurrence of that learned judge, entered a nonsuit.

[BRETT, J. I have ever since repented of having given way in that case.

KEATING, J. I observe that the Lord Chief Justice in the Court of Queen's Bench cites the judgment of my brother Brett and applies it to the decision of the present case; and the ground on which the decision in *Adams* v. *Lancashire and Yorkshire Railway Co.* (2) proceeded is explained in the Court of Queen's Bench, that the plaintiff incurred an obvious danger in order to remedy an inconvenience not amounting to a justification to him for incurring the danger.]

That is much stronger than the present case; here was no inconvenience whatever. Had the plaintiff sat still he never would have met with the accident.

[KELLY, C.B. It would seem that the Court of Common Pleas took upon themselves to say not only that there was evidence of want of proper care on the part of the plaintiff but conclusive evidence, on which the jury ought to have so found.]

That makes the case still stronger for the defendants in the present case. And it is fully borne out by the case of *Bridges* v. *North London Railway Co.* (3) in this Court, in which the majority of the Court held that the question of contributory negligence was open on the reservation of leave to enter a nonsuit if there was no evidence of negligence on the part of the defendants; negligence meaning negligence which caused the accident.

[KELLY, C.B. If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of

(1) Law Rep. 3 Ex. 150; Law Rep. 4 Ex. 117.

(2) Law Rep. 4 C. P. 739.

(3) Law Rep. 6 Q. B. 377.

the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit.]

Not if the evidence of the plaintiff's improper conduct comes out in the course of the evidence for the plaintiff. Channell, B., in *Bridges* v. *North London Railway Co.* (1), says: "It is not enough merely to shew some negligence on the part of the defendants contemporaneous with the accident. In order to constitute a cause of action, the damage to the party complaining must be caused by the negligence of the defendants. Here the proximate cause of the damage was the act of the deceased in descending from the carriage when he did." So here the plaintiff's own conduct was the cause. Again: "I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence, if it exists; yet if facts are disclosed on the plaintiff's case, the truth of which is not disputed, and which, if true, clearly shew the plaintiff contributed to the accident, then the judge may nonsuit, not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants." Bramwell, B., in substance says the same thing. (2) Therefore the principle on which *Adams* v. *Lancashire and Yorkshire Railway Co.* (3) was decided was upheld by this Court in *Bridges* v. *North London Railway Co.* (4) It is submitted, therefore, that in this case the plaintiff brought the accident on himself by his improper conduct in unnecessarily pressing against the door without first ascertaining whether it was properly fastened; and there was consequently no evidence of the defendants' liability.

KELLY, C.B. I am of opinion that this judgment must be affirmed. The question for our consideration is, whether there is any evidence of the liability of the defendants, the rule being to enter a verdict for the defendants on the sole ground that there

(1) Law Rep. 6 Q. B. at pp. 392, 394.
(2) Law Rep. 6 Q. B. at p. 395.
(3) Law Rep. 4 C. P. 739.
(4) Law Rep. 6 Q. B. 377.

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was no evidence of the liability of the defendants. Now what is the evidence? It appears that the plaintiff was a passenger by the defendants' train, and that, as he was passing from one station to another, with a view of looking out of the window he rose from his seat and took hold of the bar of the window and pressed against it. The pressure, such as it was, of some part of his body, upon his taking hold of the bar, caused the door to open, and the motion of the train to throw him out of the carriage, whereby he sustained the injury complained of. These are all the facts, and the first question is, whether there was any evidence of negligence on the part of the defendants; and the second question which must necessarily arise from the terms of the reservation,—viz., that there was no evidence of *liability*, not merely of negligence, on the part of the defendants,—is whether there was any evidence to go to the jury that the mischief which befel the plaintiff was caused by the negligence of the defendants.

First, was there any evidence of negligence at all on the part of the defendants? I am of opinion that there was evidence for the jury to consider, whether the defendants' servants had not, when this train left the station from which it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened. There was evidence to go to the jury that they had failed in the performance of that duty. But the preliminary question arises, is it their duty? I am of opinion that it is—that it is the duty of the railway company, by their servants, before the train starts upon its journey, to see that the door of every carriage is properly fastened. Here was evidence that this door was not properly fastened: for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go to the jury, upon which they were justified in finding that there was negligence on the part of the defendants.

But then, I agree, we must go further, and inquire whether there was evidence of "liability:" in other words, whether there was evidence also that the negligence of the company was the cause of the mischief which occurred to the plaintiff. I am of opinion that there was evidence. Certainly the mischief would not have befallen him if that door had been properly fastened. The

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question is, therefore, whether he did anything which it was not lawful for him to do, and which we should be satisfied, taking the whole evidence together, was the cause of the mischief which befel him. If he did, I agree that the case fails on the part of the plaintiff. But why? Because, though he has proved that the defendants were guilty of negligence, he has not proved that that negligence was the cause of the mischief which befel him. The question of what has been termed contributory negligence does not, in my opinion, arise: first, because I am clearly of opinion upon the facts that there was no evidence of contributory negligence; but even if there were evidence of contributory negligence, the rule is not for a new trial on the ground that the learned judge did not leave that question to the jury or that it was a verdict against the weight of evidence: and there was no right to entertain any such question. And, therefore, upon this case, and on the facts that are before us, no question whatever of contributory negligence arises. The question is, whether there was evidence of negligence on the part of the company which caused the accident. I have already shewn that there was evidence of negligence; and that there was evidence to go to the jury that their leaving the door not properly fastened was the cause of the injury which the plaintiff sustained without any improper act on the part of the plaintiff. Because I am of opinion that any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if by reason of its not being properly fastened his lawful act causes the door to fly open, the accident is caused by the defendants' negligence.

I think, therefore, the Court of Queen's Bench were right in discharging the rule, and the judgment must be affirmed.

MARTIN, B. I am also very clearly of opinion that the Court of Queen's Bench were right; but I cannot go to the length of the Chief Baron in this matter, for I think there was a question of contributory negligence which was properly left to the jury.

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A man was travelling on the Underground Railway, where there is little to see except walls, and there are attached to the windows, as any person who has travelled by it knows, bars, which clearly indicate it to be a dangerous thing to put one's head or hand out of the window. Therefore, it seems to me, that you cannot possibly shut out from the consideration of the jury whether or not a man may not do wrong, and know that he is doing wrong, in putting his head or hand out of the window. But in this particular case what occurred was this. The man was sitting in the carriage, he meant to look out of the window to see if certain lights were visible and to call the attention of his brother to them, but before he did anything of this sort, by merely putting his hand on the bar, the door flew open, and the man met with the accident. It might have occurred if he had intended merely to shift his seat to the other side of the carriage, if he had accidentally put his hand upon the bar. It seems, under these circumstances, impossible for me to take upon myself to say "I will nonsuit this plaintiff, as there was no case to go to the jury." The truth is, I do not think the case was arguable.

KEATING, J. I also think that the judgment of the Court below ought to be affirmed, because, taking the question as it seems to be now established it must be put to the jury, it appears to me that there was clearly evidence to go to the jury. I agree with Mr. Harrison that the question to be put to the jury is, whether the defendants have been guilty of negligence which caused the accident complained of by the plaintiff; and in looking at such a question, of course, it is extremely difficult to disengage it from the consideration of whether there was or was not contributory negligence upon the part of the plaintiff. But assuming, for the purpose of argument, that there may be such contributory negligence on the part of the plaintiff as would entitle the judge to nonsuit upon the ground that a verdict finding that there was no contributory negligence would be set aside as being perverse,—assuming that for this purpose without deciding that it is so,—it is clear in this case that the judge could not have taken upon himself to withhold the question from the jury, whether it be taken as a

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simple question of the negligence of the defendants, or whether it be taken to be, as I take it to be, the right question, whether there was negligence upon the part of the defendants such as caused the accident; because for the reasons already pointed out by the Lord Chief Baron and my Brother Martin, although it might have been a question for the jury whether there was or was not contributory negligence, without going the length of saying there was no evidence of that, yet it seems clear to me that there was evidence on the compound question, if I may so express myself. There was evidence that the negligence of the defendants caused the accident, without such negligence upon the part of the plaintiff as would have freed the defendants from liability in that respect.

The case, which has been so much relied on, of *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1), has been much commented upon. In that case a door having flown open three times, and each time the plaintiff having succeeded in shutting it without any accident, upon the fourth occasion when it flew open (which it did from a defective construction of the lock, and therefore clearly from negligence upon the part of the railway company), in trying to shut it he fell out of the carriage, and was injured. Now my Brother Brett, before whom the case was tried, was of opinion that there was clearly a case to go to the jury upon the part of the plaintiff, and left it to the jury, giving leave to move; and the jury having found for the plaintiff, the Court of Common Pleas certainly did enter a nonsuit upon the ground that there was no evidence to go to the jury. With reference to the principle upon which that case proceeded, I agree with the principle laid down by my Brother Brett. He says, "It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person in incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid

(1) Law Rep. 4 C. P. 739.

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such inconvenience." (1) I approve of that rule entirely. Sitting in a court of error, I may be permitted to say what I would not venture to say if I were sitting in a court below, that I think the right application of that rule to the facts of that case was that which was applied at the trial by my Brother Brett, and not when the case was before the court in banc; but in the principle upon which that case was decided, I for one entirely concur; and I think here, if Mr. Harrison could have shewn that what was done by the plaintiff was obviously dangerous—manifestly dangerous—that the plaintiff would not have been justified in incurring an obvious manifest danger for the purpose of getting rid of no inconvenience at all: because in this case there was no inconvenience whatever. But it appears to me that the plaintiff had a right to assume that the company were not negligent, and that all the doors were properly shut; and having a right to assume that, he had a right to get up and do what he did, to put his hand upon the bar; and in doing that the door flew open, and the accident occurred. That being so, it appears to me this case is entirely denuded of any of the difficulty that surrounded the cases which were referred to by Mr. Harrison. Of course, each of these cases must be judged by its own particular facts, and looking to the facts of this case, I do not entertain the least doubt that the judgment of the Court below was right.

BRETT, J. I agree that in these cases the plaintiff is bound to give evidence to satisfy the jury that the injury of which he complains was caused by the negligence of the defendants, or some person for whom the defendants were answerable, and that that negligence of the defendants was the cause of the plaintiff's injury; and further, that it was the sole cause, in a certain sense. This does not mean that the defendants' negligence was the only cause, because, supposing it were attempted to be shewn that some person other than the defendants (not the plaintiff) had also contributed by negligence to the accident, that would be no defence to the defendants. The meaning of the phrase, "that it must be solely caused by the defendants," is, solely caused as between them and the

(1) Law Rep. 4 C. P. at p. 743.

plaintiff, that is to say, that it is caused by the negligence of the defendants, without being contributed to by any negligence or want of care on the part of the plaintiff.

The question in this case is, whether there was evidence of each of those propositions on which a jury might properly find in favour of the plaintiff. It has been argued by Mr. Harrison that there is no evidence of the first proposition, viz., that there was negligence by the defendants. But I apprehend that negligence consists in this: where something happens which would not happen, if ordinary care and skill were used, the happening of that is evidence on which a jury may find that there has been negligence on the part of the defendants. Now, here a railway carriage door, upon a slight pressure, flies open. Mr. Harrison seemed to think it was more in favour of the defendants that that should be the door which was on the opposite side from the platform. On the contrary, as far as we are allowed to take notice of such things, I should suppose that a traveller had a greater right to assume that that door was properly fastened than the other. But he clearly has a right to assume that either door is securely fastened, so as to resist a slight pressure. I therefore think that there was evidence on which a jury might properly find that there was negligence on the part of the company's servants. But was there any evidence on which a jury might find that that was the cause of the accident? When upon a slight pressure the door flies open, and thereupon a man shoots out of the carriage, I apprehend the jury are entitled to say it was the non-fastening of the door which was the cause of the accident.

Then was there evidence that it was the sole cause? Now that becomes somewhat more complicated. If, during the plaintiff's case, an act of his was proved, which was so clearly contributory to the accident that it would be unreasonable for any reasonable men to find to the contrary, and if that act was so clearly a negligent act that it would be unreasonable in reasonable men to find that it was not negligence, so that any Court would, upon either of those points, immediately set aside a verdict of the jury finding the contrary of either, I am not prepared to say that the judge might not then rule that the plaintiff had failed to put forward evidence

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upon which a jury might find in his favour, that the accident was solely caused by the defendants' negligence. But here it does not seem to me that the act of the plaintiff was such as any judge or any Court have a right of themselves to pronounce to be so negligent as to say that it would be unreasonable for a jury to find that it was not negligence. I therefore think that, the plaintiff not being shut out from affirming that he himself had not been guilty of any negligence, that was a point that was properly left to the jury; and that the jury were justified in saying that he had not been guilty of negligence, that is to say, had not been guilty of not using ordinary care in his mode of travelling. I therefore think that there was evidence in this case from which the jury might fairly find for the plaintiff; and no case which would justify the judge in withdrawing the evidence from the jury. It is said that this case is governed by the case of *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1) I think not. The ground upon which that judgment was based was certainly that the plaintiff there did do something so obviously dangerous, and so obviously without necessity, that the Court were entitled to deal with the matter, and I think the case put by Mr. Harrison might possibly come within the same rule when it arises. He says: If a door were open at the starting of the train, and the passenger were not to attempt to shut the door, but at once to jump out of the door, either on the platform or after the train had passed the platform, it then might fairly be said, if a jury were to find that that was not negligence on the part of the plaintiff, that such a finding was unreasonable, and therefore the judge or the Court might deal with such a case. But, however that might be, there was no such obvious danger in this case, no such evidence as would entitle the Court to act upon the rule laid down in *Adams* v. *Lancashire and Yorkshire Ry. Co.* (1) Whether that decision was correct in applying the rule which it laid down to the evidence before the Court, I confess at this moment I very much doubt. I was a party to that judgment, as I have stated, but I think it is obvious, from the form of all the judgments in that case, that I was a reluctant party at the time to that judgment: but the authority of the other judges was so great

(1) Law Rep. 4 C. P. 739.

that I could not resist it; and I think, if that case were to come into a court of error, I should be prepared now to say that, although the rule laid down was right, yet its application to the circumstances was wrong.

CLEASBY, B. In the present case I think it clear that no question of contributory negligence arises at all. Such a question arises when both parties are substantially in fault, and when the fault of each contributes to the disaster. The rule was established before railways were made, and an illustration of it would be, one man driving furiously in the crowded streets of London at fifteen miles an hour, and a man driving on his wrong side not quite so furiously, perhaps, but still obviously in fault; and so both being in fault at the time, the fault of each having not exactly an equal share, but having a share in what took place, neither can recover, because both were clearly in fault. But all that Mr. Harrison has made out in this case, as far as I can judge, is not that both parties were in fault, but that the act of the plaintiff contributed to the accident, but not his negligence and default. It is impossible, as it appears to me, to say that in getting up, and touching and pressing against the door as he did, there was anything in the nature of negligence at all. That part of the case of the defendants, it appears to me, therefore fails altogether.

Then the question is whether there is such evidence of negligence in the defendants in this case that a jury might reasonably find a case of liability on the part of the defendants. I apprehend there can be no doubt now that this is the way the case must be regarded after the considered judgment of the whole Court of Exchequer Chamber in the case of *Ryder* v. *Wombwell*. (1) It is there said: "It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in *Jewell* v. *Parr* (2), not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey* v. *London and Brighton Ry. Co.* (3) Williams, J., enun-

(1) Law Rep. 4 Ex. at p. 39. (2) 13 C. B. 909, at p. 916; 22 L. J. (C.P.) 253.
(3) 3 C. B. (N.S.) 146, at p. 150; 27 L. J. (C.P.) 39.

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ciates the same idea thus: 'It is not enough to say that there was some evidence . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence.'" This is, of course, upon a rule to enter a verdict, which is a matter of consent between the parties, in order to prevent the necessity of a new trial which would be the result of a bill of exceptions. When it comes before the Court in that way, they are to look at the whole case and see whether there is such evidence as might reasonably satisfy a jury of the liability charged. Now, as to whether in a case of this description you may or may not look at the contributory negligence of the plaintiff, I will not enter upon that question, except for the purpose of saying that you could not do so in all cases. Whether you might do so in a case in which it is the act of the plaintiff that causes the damage he sustains—his own act, as for instance, jumping out of a carriage, which was the case in *Bridges* v. *North London Ry. Co.* (1); where it is not so much a contributory act as the act itself that causes the injury, which he says was consequent upon the negligence of the defendants—whether in such a case as that you may look at the conduct of the plaintiff I will not now say. It was the opinion of some of the Court in the case of *Bridges* v. *North London Ry. Co.* (2) that you might do it in such a case as that. But it is not necessary for the decision of the present case to decide that, because, as I have said, in my opinion, there was no negligent act of the plaintiff whatever.

We have only, therefore, one question to deal with, whether there is reasonable evidence of a want of due and reasonable care in the defendants. Now, it cannot be said that there was any warranty on the part of the defendants that this door should be sufficiently and carefully fastened, and therefore it cannot be put that simply because the door was not fastened and flew open there was liability. I think there must be some evidence of a want of due and reasonable care. But then you find that upon a slight pressure the door opens. In considering what evidence is sufficient to call for an answer, I think that you must look at the means

(1) Law Rep. 6 Q. B. 377.

(2) See the judgment of Cleasby, B., Law Rep. 6 Q. B. at p. 384.

which the plaintiff has of proving more. The plaintiff could not shew, at all events he could not be expected to shew, that there was no fastening to the door, or that the fastening had got defective and therefore could not be relied upon, or that with a good fastening the door had been carelessly put to by the porter; but what he proves is this: he shews that a state of things takes place which probably arose from some negligent act of the defendants, and he calls upon them for an answer. The state of the fastening of the door is not shewn. If they had shewn that the door was perfectly right in every respect, that the fastening was not defective, and it had appeared that in shutting in succession a great number of doors with the despatch which is necessary there had been some haste and defect so as to put a case of almost inevitable accident, then the question would have arisen perhaps whether there was not some evidence to be left to the jury; but certainly that would be a case in which the proper conclusion of the jury would be, in my opinion, that it was not the sort of negligence that involves responsibility. But that would be a question for the jury still; and in any way, I think, the plaintiff having proved all he could be expected to prove, that the door was so defectively fastened as to fly open when he had a right to expect that it would be fastened, it is quite sufficient to call on the defendants to shew that that arose from circumstances which did not amount to negligence.

GROVE, J. I am of the same opinion. I think there is some evidence of negligence here to go to the jury. I suppose the Court must assume ordinary facts, otherwise a door would have no meaning at all in the ears of the Court, and one must assume (at all events the jury must have evidence of that) that it was the ordinary case of a railway door that shuts from the outside, and can only be conveniently shut by a person from the outside. It is jammed to with some force in order to enable the catch to bite and hold the door firm, and it would be extremely inconvenient if it had to be shut by the passengers inside. That being the case, the ordinary duty of the railway servants when a train leaves the station would be to shut and firmly fasten the catch of the door, and they are deviating from their ordinary practice, and, I think,

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their ordinary duty, if they omit so to shut the door—the doors being so constructed, and properly so; because if you arranged a door so that the passenger could open it from the inside, it would be an extremely perilous system. It must open with a comparatively light catch; passengers would be continually opening the door, and it would be very much worse for the general safety of the public. Then if that be the duty of the Company's servants, there was some breach of duty; or there might be evidence for the jury to consider whether there was some breach of duty if the door was left open. Then it was said there was no evidence here that the Company's servants left it open. It might have been opened by some one else, of which we have no evidence. But in almost every question that can come before a jury, probabilities must be looked at. Absolute mathematical proof of each circumstance in all human transactions cannot be gone into. Were, then, the jury entitled to look here at the probabilities of the case, assuming the door to be such as I have described—an ordinary door, to be shut, and shut with some degree of force, from the outside? The plaintiff was called as a witness. He could have been cross-examined. Probably the jury assumed, no question having been asked him, that he had not tampered with the door, or his brother who was in the carriage with him. Was there not, therefore, a primâ facie probability that there had been negligence on the part of the servants of the Company, and that they had left the door open? And if so, that could have been rebutted by the defendants calling the servants to give evidence that they had shut all the doors in the ordinary way, and as to the state of the door when the train left the previous station. It seems to me that there was a fair and primâ facie probability to leave to the jury, and that there was some negligence in the servants not performing their ordinary and usual practice of shutting the doors at the time when the train left the previous station.

Secondly, upon the question of contributory negligence, I refrain from giving any opinion at present whether there might be cases in which a court of error, or a court looking merely at the law of the question, as a court would upon a bill of exceptions, could enter upon a question of contributory negligence.

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And here I may say, on looking into the case of *Bridges* v. *North London Ry. Co.* (1), which has been very much relied upon, that the head-note appears to be erroneous in stating that it was held by a majority of the Court of Exchequer Chamber, viz. Bramwell, Channel, Pigott and Cleasby, BB., that upon the reservation of leave to enter a verdict for the plaintiff, if there was any evidence of negligence on the part of the defendants proper for the jury, the question of whether there was evidence of contributory negligence on the part of the plaintiff was open. Now, I find upon referring to the case, that in the judgment of Pigott, B. he gives no opinion at all on the question of contributory negligence; but he says: "The conclusion at which I have arrived is that, whether Mr. Bridges brought this misfortune upon himself by contributory negligence in descending from the carriage at an improper place, or whether he sustained his injury from some accidental circumstance of falling on the rails after he had reached the ground, there is no negligence on the part of the railway company's servants, to which it is shown to have been due by any reasonable evidence; and therefore the judgment of the Queen's Bench ought to be affirmed." (2) It would appear, therefore, that, in that case, three of the judges were of opinion that a question of contributory negligence might be entertained by the Court, and three that it could not; and therefore we are not bound at present, that being the strongest case on the subject, by the decision of the Exchequer Chamber, as to whether the question of contributory negligence, which must be a question of fact, is not open, assuming that there was some negligence on the part of the defendants, or whether the Court could entertain it. That no doubt is a matter of some importance, a matter as to which the profession, I believe, entertain a considerable doubt.

There is another observation to be made upon that case; that, as the majority of the Court were of opinion that there was no negligence on the part of the defendants, it was not absolutely necessary that they should enter into the question of contributory negligence; and the expression of their opinion was to a certain extent obiter. In the present case I do not think it can be

(1) Law Rep. 6 Q. B. 377. (2) Law Rep. 6 Q. B. at p. 388.

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contended that the Court could adopt the view that the evidence of contributory negligence was of such a demonstrative character, that the Court could say that the verdict must necessarily pass, and absolutely ought to have passed, for the defendants on that ground; and therefore we need not in this particular case consider the question of contributory negligence. Whether any such question could or can arise, I am not sure that the test of a perverse verdict is quite a sufficient test, because that would certainly introduce, to my mind, a very considerable change in the law, if a court, acting as a Court of Law, could assume it simply as a question of law because a verdict the other way would be a perverse verdict. I am not sure whether that doctrine, if applied to some cases, might not lead to some novel results. At all events, I do not think that question arises in any way here. And *Bridges* v. *North London Ry. Co.* (1) does not decide that it is a question of law which the Court can entertain.

Judgment affirmed.

Attorney for plaintiff: *T. H. Dixon.*
Attorneys for defendants: *Burchells.*

Feb. 17.

GOLDNEY, P. O., *v.* LORDING.

Bankrupt—Composition under s. 126 *of the Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71)—*Effect of Non-payment of the Composition—Jurisdiction of the Court.*

2 CPD. 285

Where, by a resolution under s. 126 of the Bankruptcy Act, 1869, the creditors of a debtor agree to accept a composition payable by instalments, and the debtor makes default in payment of an instalment, a non-assenting creditor is entitled to maintain an action for the whole debt. So held on the authority of *Edwards* v. *Coombe* (Law Rep. 7 C. P. 519); *Re Hatton* (Law Rep. 7 Ch. Ap. 723).

DECLARATION by the plaintiff, who was the registered public officer of the London Joint Stock Bank, as indorsee of a bill of exchange drawn by one Ellis, and accepted by the defendant.

(1) Law Rep. 6 Q. B. 377.

Plea, a composition by an extraordinary resolution under the Bankruptcy Act, 1869. (1)

Issue thereon.

The pleadings, facts, and course of the trial are sufficiently stated in the judgment of the Court.

May 30, 31, 1872. *G. W. Harrison* shewed cause, and cited *Fessard* v. *Mugrier* (2); *Hazard* v. *Mure* (3); *Ex parte Hemingway*. (4)

Prentice, Q.C., and *Joyce*, in support of the rule.

It is unnecessary to report the argument, the judgment of the Court having proceeded upon the authority of *Edwards* v. *Coombe* (5) and *Re Hatton* (6), decided subsequently to the argument.

Cur. adv. vult.

Feb. 17. The judgment of the Court (Cockburn, C.J., and Quain, J.) was delivered by

QUAIN, J. This was an action brought by the London Joint

(1) 32 & 33 Vict. c. 71, s. 126. "The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. . . .

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; and if satisfied that it has been so passed he shall forthwith register the resolution and statement of assets and debts. But until such registration has taken place, such resolution shall be of no validity. . . .

"The provisions of a composition accepted by an extraordinary resolution, in pursuance of this section, shall be binding for all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors. . . .

"The provisions of any composition made in pursuance of this section may be enforced by the Court on a motion made in a summary manner, by any person interested, and any disobedience of the order of the Court, made on such motion, shall be deemed to be a contempt of Court. . . ."

Sect. 127 makes the resolution conclusive evidence, in the absence of fraud, that all the requisitions of the Act have been complied with.

(2) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126.

(3) 6 H. & N. 434; 30 L. J. (Ex.) 97.

(4) Law Rep. 7 Ch. App. 724, n. (1).

(5) Law Rep. 7 C. P. 519.

(6) Law Rep 7 Ch. App. 723.

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Stock Bank, in the name of the plaintiff, as public officer, on a bill of exchange for 87*l.* 11*s.*, indorsed by one Ellis, the drawer, to the bank, against the defendant, as acceptor.

The defendant pleaded, that an extraordinary resolution was duly passed under s. 126 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), for the payment of a composition of 3*s.* in the pound to defendant's creditors, which resolution was duly confirmed and registered according to the Act, and that the defendant had fulfilled all conditions necessary to make that resolution binding on the bank, and he brought into Court 9*l.* 17*s.*, the first two instalments which had become due before action, the third instalment not being then due. Issue was joined on this plea.

At the trial before Hannen, J., at the sittings after Michaelmas Term, 1871, it was proved that an extraordinary resolution of defendant's creditors was duly passed by the proper majority in number and value, in accordance with s. 126 of the Bankruptcy Act, 1869, and afterwards confirmed, by which it was resolved that a composition of 3*s.* in the pound should be accepted, payable in three instalments of 1*s.* each, the first to be paid within a week of the first meeting, the second within three months from that date, and the third within nine months from the same date, and that the second and third instalments should be secured by the promissory notes of the defendant and a third person.

The bank did not attend or vote on this resolution. Two of the instalments had become due before action, but no proof was given that the defendant had paid or tendered, or was ready to pay those instalments, or that he had delivered the promissory notes.

On this, it was submitted for the plaintiff, that the plea was not proved; but it was contended for the defendant, that it was not necessary to prove performance of the stipulations or conditions contained in the resolution, as the resolution in itself when duly passed and registered put an end to the cause of action, and that the plaintiff's remedy was to apply to the Court of Bankruptcy to enforce performance of the resolution.

The learned Judge ordered the verdict to be entered for the plaintiff, and gave the defendant leave to move to enter the

verdict for him, if the Court should be of opinion that the matters not proved were immaterial.

A rule was accordingly obtained for that purpose, and argued before us. We think it sufficient to say that since the argument on this rule, the point raised on behalf of the defendant has been decided by the Court of Common Pleas, and afterwards by the Lords Justices.

In *Edwards* v. *Coombe* (1) the Court of Common Pleas held that it was competent for a non-assenting creditor to sue for his debt where the debtor had failed to pay or tender the composition within the time agreed on; and in *In re Hatton* (2) the Lords Justices, following the judgment of the Court of Common Pleas, held, that where, by resolutions under the Bankruptcy Act, 1869, the creditors agreed to accept a composition payable by instalments, and the debtor made default in paying an instalment, a creditor was entitled to maintain an action for the balance of the whole debt remaining due, and would not be restrained by the Court of Bankruptcy.

On the authority of these cases, we think this rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *Clarke, Son, & Rawlings.*
Attorney for defendant: *Leard.*

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 7 Ch. App. 723.

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Feb. 17.

GILL *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Railway Company—Carriers of Cattle—Negligence—Conditions as to Restiveness of Cattle—Principal and Agent—Agreement for interchange of Traffic.

The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he booked her for S. by the defendants' railway. He signed a contract, under which it was agreed between him and the G. N. Co. that they should not be responsible for any loss or injury to cattle, in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, &c., should be established from all parts of one company and beyond its limits to all parts of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendants for the loss of the cow, the Court having power to draw inferences:—

Held, first: That the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, shewed that the G. N. Co. became the agents of the defendants to make the contract for the carriage of the cow.

Secondly: That the condition in the contract did not relieve the defendants from liability for negligence on the part of their servants in delivering the cow.

Thirdly (by Blackburn and Lush, JJ.; Mellor, J., dissenting): That the inference to be drawn from the facts was that there was negligence on the part of the defendants' porter; and that they were, therefore, liable to the plaintiff for the loss of the cow.

FIRST COUNT: That the defendants were carriers of cattle for hire from Doncaster to Sheffield, and the plaintiff delivered to the defendants, and the defendants received as such carriers, a certain cow of the plaintiff, to be by the defendants safely and securely carried from Doncaster to Sheffield, and there delivered for the plaintiff for reward to the defendants; that all conditions precedent were fulfilled to entitle the plaintiff to have the cow safely and securely carried from Doncaster to Sheffield, and there de-

livered; yet the defendants did not safely and securely carry the cow, nor deliver the same.

Second count: That the plaintiff delivered to the defendants, being public carriers of cattle from Doncaster to Sheffield, and the defendants received, a certain cow of the plaintiff, upon the terms that the defendants would safely carry the cow from Doncaster to Sheffield, and would at Sheffield provide a safe and proper place for the unloading of the cow from the carriage of the defendants, and for the delivery of the cow, and the receiving of the cow by the plaintiff, and would use due care in and about the unloading and delivering and receiving, for reward to the defendants; that all conditions precedent had been fulfilled to entitle the plaintiff to maintain an action for the breach of the said terms; yet the defendants did not at Sheffield provide such safe and proper place, nor use due care in and about the unloading and delivering and receiving, and by reason thereof the cow escaped and was killed.

Third count: That the plaintiff entrusted to the defendants a cow of the plaintiff, and the defendants received the same, and undertook the care and custody thereof. Yet the defendants took so little and such bad care of the cow, and so negligently conducted themselves, that the cow escaped and was killed.

Pleas: 1. As to first count, a denial of the receipt of the cow. 2. As to second count, a denial of the terms on which the defendants received the cow. 3. As to third count, a denial that the plaintiff entrusted the cow to the defendants. 4. As to the three counts, not guilty. 5. As to the three counts, that the defendants received the cow upon the terms that they should not be responsible for any loss or injury to the cow in the receiving, forwarding, or delivering the same, if such damage should be occasioned by the kicking, plunging, or restiveness of the animal; and that the loss and injury complained of was occasioned by the kicking, plunging, or restiveness of the animal in delivering the same.

Issue thereon.

At the trial, at the Yorkshire summer assizes, 1872, before Cleasby, B., the learned judge ruled that the cow was killed solely owing to her restiveness, and nonsuited the plaintiff, leave being

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reserved to move to enter a verdict for 15*l.*, the Court having power to draw inferences from the facts.

A rule was afterwards obtained, upon the grounds, that the contract between the plaintiff and the defendants was sufficiently established, and that the case was not within the exception; and that, independently of the contract, there was liability on the part of the defendants.

The facts are fully stated in the judgments.

Feb. 4. *John Mellor*, and *Kennedy*, shewed cause, and contended; First, that the contract was expressly made with the Great Northern Railway Company, and not with the defendants' company; and that the object of the agreement between the two companies was only that there should be an interchange of traffic between them, and that they should work harmoniously. (1) Secondly, that the fair inference from the facts was, that the death of the cow was caused, not by the negligence of the defendants' servants, but by her own restiveness: *Blower* v. *Great Western Ry. Co.* (2); *Kendall* v. *South Western Ry. Co.* (3)

Price, Q.C., and *Dodd*, in support of rule, contended that the plaintiff was at liberty to sue either the Great Northern Railway Company or the defendants.

[BLACKBURN, J. We need not consider whether the two companies are partners; the traffic is carried on for the joint benefit of the two, so that they are joint principals, and either may be sued.]

Secondly, they contended that the cow was killed through the negligence of the defendants' servants, and not owing to the innate vice of the animal carried: *Rooth* v. *North Eastern Ry. Co.* (4)

Cur. adv. vult.

Feb. 17. The following judgments were delivered:—

MELLOR, J. This was an action tried before my Brother Cleasby at the last summer assizes at Leeds, who directed the plaintiff to be nonsuited.

It appeared that the plaintiff Gill, a cowkeeper residing at

(1) See post, p. 190.
(2) Law Rep. 7 C. P. 655.
(3) Law Rep. 7 Ex. 373.
(4) Law Rep. 2 Ex. 173.

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Sheffield, had purchased a cow, which he desired to send from Doncaster to Sheffield, and accordingly took her to the Great Northern Railway Station at Doncaster, and there booked the cow for Sheffield by the Manchester, Sheffield, and Lincolnshire Railway, and signed a contract, under which it was agreed between the undersigned and the Great Northern Railway Company, that the animal named on the other side was to be conveyed only upon the conditions mentioned upon the ticket received by the undersigned from the company, and it was not to be insured. One of the conditions referred to, and upon which the question in this case turns, was as follows: "The Great Northern Railway Company give further notice, that they convey horses, cattle, sheep, pigs, and other live stock, in waggons, subject to the following conditions—1st, that they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal." The other conditions are not material.

The plaintiff's cow was put in a truck belonging to the Manchester, Sheffield, and Lincolnshire Railway Company, and the plaintiff and his man travelled by the same train, and they and the cow arrived at the station at Sheffield about twenty minutes to seven o'clock; the plaintiff and his man then got out and walked down to the place where the cattle arriving by train are unladen. They waited until the trucks were shunted to the usual place for the purpose of being unladen, being a sort of yard or landing-place inclosed with a post and rail fence on one side and at one end, and by an inclosed pig-pen at the other end, with an incline leading into it. It was separated from the line of railway by posts and chains. A servant of the defendants' company was in charge of this yard or loading-place, and as soon as the trucks in which the cattle had been carried had been shunted to the side of the yard, he called out "Who belongs to the Sheffield cow?" The plaintiff immediately said, "I do." The porter in charge said, "Have you signed?" Plaintiff said "No." Whereupon he directed the plaintiff to go to the office and sign. The plaintiff accordingly did so, saying to the porter, "Don't let her out until I get back." After the plaintiff had signed the book at the office, he came back, just as the

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porter was unfastening the truck. The plaintiff thereupon said, "Don't let that cow out; if you do, she'll go slap at you." The porter turned and laughed, and said, "She'll be right when she gets out." The porter said, "Close the gate." Whereupon plaintiff said, "I shall go outside," and did so. The porter stood inside, and drew the bolt of the truck, and the cow rushed out. She ran about the yard. The chains were down, and the porter and plaintiff's man struck at her to turn her back; she ran up the incline into the pig-pen, and then down and up again, and jumped over the rails of the pig-pen on to the line and so into the tunnel, and was killed. This was all the evidence as to the circumstances attending the injury to the cow.

The plaintiff, for the purpose of establishing his right to sue the defendants, called for and put in evidence an agreement between the Manchester, Sheffield, and Lincolnshire Railway Company and the Great Northern Railway Company, dated the 17th of June, 1857, of which the material clauses were the following:—

"That a complete and full system of interchange of traffic in passengers, goods, cattle, parcels, &c., &c., be established from all parts of one company, and beyond its limits, to all parts of the other company, and beyond its limits, with 'through tickets,' 'through rates,' and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock, mileage and demurrage not being charged between the two companies, the repairs of the rolling stock of each company being done by the company owning it.

"That the two companies do aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated; and that every possible facility be given by either party to develop and increase the traffic of both.

"That a joint committee of three directors of each of the two companies shall have the charge of the working out of this agreement, with power to call in a chairman unconnected with the traffic of either company (say, a barrister of good practice, or other public man of good standing) summarily to settle any dispute that may arise.

"That, in dividing the through traffic, the following miles shall be given to the Manchester, Sheffield, and Lincolnshire Company,

from the total actual aggregate mileage between Manchester and places west of Manchester, and London and places south of London, 20 miles; between Manchester and Sheffield, inclusive of both, and London and places south of London, 18 miles; between Sheffield and London, ditto, ditto, 10 miles; between Hull and London, ditto, ditto, 10 miles; between Grimsby and London, ditto, ditto, 20 miles. All other traffic to be divided on actual mileage. A model settlement to be prepared by the accountants. All traffic to be divided after the deduction of government passenger duty, and the usual clearing-house terminals on goods and parcels traffic."

This was the plaintiff's case; and it was thereupon contended on the part of the defendants, that the contract for the carriage of the cow was with the Great Northern Railway Company, and not with the defendants; and, further, that the loss of the cow was caused by the cow being restive and unfit to be carried by railway.

My Brother Cleasby, being of opinion that the loss of the cow was wholly attributable to the character of the cow, and that if the defendants did not completely perform their contract, it was because the cow could not be delivered, directed the plaintiff to be nonsuited, leaving the other question open to the defendants, and reserving leave to the plaintiff to move to enter a verdict for him for 15*l.* if any contract was established between him and the defendants, and if the case was not within the exception in the contract as to restiveness; the Court to draw inferences from the facts.

At the conclusion of the argument we declared our opinion, that the action was rightly brought against the defendants, inasmuch as, if the provisions of the agreement of the 17th of June, 1857, did not constitute an actual partnership between the respective companies as to all the matters embraced by it, still they came within the rule expressed by Lord Cranworth in *Cox* v. *Hickman* (1): "The real ground of liability is, that the trade has been carried on by persons acting on his [the defendant's] behalf;" and per Lord Wensleydale to the same effect in the same case (2). In our opinion, the Great Northern Railway Company became, by virtue of their agreement with the defendants, the agents of the latter, to make the contract for the carriage of the cow with the plaintiff.

(1) 8 H. L. C. at p. 306. (2) 8 H. L. C. at p. 315.

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We reserved for further consideration the question as to the effect of the exception as to restiveness contained in the contract.

It was contended for the plaintiff, that although the effect of the reservation was to relieve the defendants from liability for any injury to the cow arising from the restiveness of the animal during the receiving, forwarding, or delivering the same, yet it did not relieve them from liability for negligence on the part of the defendants' servants in the delivery of the cow; and we are all agreed that such is the true effect of the contract.

But it was further contended, that we ought to draw the inference that there was negligence on the part of the defendants' servants in the delivery of the cow under the circumstances above stated; and with regard to this contention on the part of the plaintiff a difference of opinion amongst the members of the Court arises. It was suggested, in the first place, that the porter in charge of the landing-place was too hasty in unfastening the door of the truck, after he had been warned by the owner that if he did so, the cow would run slap at him; secondly, that he ought to have waited until other animals had been unloaded from the trucks, which might have had the effect of calming the restiveness and excitement of the cow; and, thirdly, that the chains of the posts dividing the landing yard from the line of rails were some of them down.

Now, I am of opinion that there is nothing in any of these suggestions, or in the facts as they appear on the judge's notes, which ought to induce us to draw the inference of negligence on the part of the company's servants, which frees the case from the effect of the reservation as to restiveness contained in the contract of carriage. I think that the effect of that reservation was to relieve the defendants from *all* liability arising from the restiveness of the cow. I cannot doubt that the causa causans of the injury was the restiveness of the cow. The contention of the plaintiff, if it could be successful, would extend instead of diminish the liability of the defendants in the carriage and delivery of such animals, as it would require the company not merely to provide an ordinary and reasonable place of delivery, and to use ordinary and reasonable care adapted to animals in their normal condition, but the limit of the precautions to be

adopted by the defendants would necessarily be required to be commensurate with the excitement and restiveness of the cattle to be delivered. It cannot, I think, be doubted that if the cow in the present case had not been restive within the meaning of the reservation in the contract, the place of delivery, and the course adopted by the company's servants, would have insured the safe delivery of the cow. The place of delivery was the usual, and, under ordinary circumstances, a suitable place for delivery.

It is not pretended that the porter in charge was in any sense an improper or incompetent person to superintend the delivery of cattle, and most probably he had had great experience. Was there then any duty on his part to delay the delivery of the cow, because at the moment he was unfastening the door of the truck, the owner of the cow said to him, "Don't let that cow out; if you do, she'll go slap at you"? If the porter in charge was to govern the discharge of his duty by such an intimation of personal danger so conveyed, the business of the company would be greatly impeded. That the cow in question was not the only beast to be delivered is manifest, not only from the evidence, but from the suggestion made by the plaintiff's counsel that the porter ought to have delayed the delivery of that cow until other cattle had been unladen. How long was the delay to last? Was it to be co-extensive with the restiveness of the animal? Was the business of the company to suffer indefinite delay and inconvenience because the plaintiff had chosen to send a cow in an unfit condition?

According to the contention on the part of the plaintiff, the reservation in the contract, instead of relieving the company and restricting their liability, would positively extend it, and instead of expressing that the company would not be liable for injury arising from the restiveness of such animals, would be construed to mean that "restive cows will be treated with *unusual* care." Surely it cannot be contended that the delay was to be co-extensive with the excitement of the cow, or that other servants were to be drawn from other duties to assist in the delivery, or that other cattle should be unloaded out of turn for the purpose of quieting this restive cow. Only one other suggestion of negligence was made,

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viz., that the chains were down; the answer to that is, that the death of the cow was in no respect due to that fact.

In conclusion, I express my opinion, that the porter was not bound to alter the usual and ordinary course of delivery by reason of what was said by the plaintiff as to the probability of his incurring personal danger, but that it was his duty to exercise his own judgment as to any danger resulting from letting out the cow, and if he did so honestly, it cannot be imputed as negligence to the company. I further think that the true effect of the company's contract was to take ordinary and usual and reasonable means of delivering cattle sufficient and reasonable for cattle in their normal condition, but that they were not, under the contract in question, obliged to depart from such ordinary, usual, and reasonable means, because the cow in question was restive, excited, and unfit to be delivered.

I agree, therefore, with the opinion of my Brother Cleasby, expressed at the trial, and I think that the loss of the cow was wholly attributable to her character and conditions, and not to negligence on the part of the company; and, therefore, that the rule to enter the verdict for the plaintiff ought to be discharged.

LUSH, J. We intimated in the course of the argument our opinion, that the action, if sustainable at all, might be brought either against the present defendants or against the Great Northern Company. The reasons for our so holding have been stated by my Brother Mellor in his judgment, and in those reasons I concur.

The case was not submitted to the jury, but leave was reserved to the Court to enter a verdict for the plaintiff, if the Court should be of opinion that the case was not within the exception of restiveness, and if any liability on the part of the defendants was established. We are therefore placed in the position of a jury and bound to draw our own conclusions, and say whether they ought to have found their verdict for the plaintiff or for the defendants. It is upon the question, what is the proper conclusion to be drawn from the evidence, that the difference between us arises.

The facts lie in a very small compass. The plaintiff having bought a cow in the market, booked her at Doncaster, to be carried

by rail to Sheffield, where he resided, he and his man travelling as passengers by the same train. The train arrived at Sheffield between six and seven in the evening of the same day, the 16th of November, and the cattle-trucks were drawn up to their proper place, by the side of the cattle-yard. The plaintiff, who had to go to the office and sign a receipt for the cow before he was permitted to take her away, told the porter not to let the cow out of the truck till he came back. On his return from the office he observed the porter was unfastening the truck. He called out to him, "Don't let the cow out; if you do, she'll go slap at you." The porter answered, "She'll be all right when she gets out; close the gate," and proceeded to unbolt the door. The plaintiff thereupon left the yard, saying, "If you do that, I shall go outside." The cow, being let out, began to run about the yard, and towards a spot where she might have got on to the line. Being driven back by some persons who were there, she ran up to a pig-pen at the other end of the yard, and leaped over the rails of the pen on to the line, where she was run over and killed by a passing train.

The fair inference from these facts is, I think, that the cow was, while in the truck, in so excited a state as to make it dangerous to let her out until preparations had been made for securing her and taking her away in safety, which is what I infer the plaintiff intended to do; and that the warning given to the porter, though it intimated only danger to himself as the consequence of liberating the cow at that moment, must or ought to have conveyed to his mind that other mischief might happen if the animal were then set at large.

It was contended for the defendants that there was no evidence of negligence, and that, at all events, the company were exonerated from liability by virtue of the conditions printed on the cattle-ticket, and by which, no doubt, the plaintiff was bound.

The condition relied on is in these terms:—

"The company give notice that they convey horses, cattle, sheep, pigs, and other live-stock in waggons, subject to the following conditions:—1st. That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal."

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It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea, in a bill of lading, relieves a shipowner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him: see *Phillips* v. *Clark*. (1)

The precise degree of care which it is the duty of a carrier to use, in delivering the goods entrusted to him, must depend upon and vary with the nature and condition of the thing carried, and the ever-varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits, and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under the circumstances and subject to the conditions in which the carrier is placed, and under which he is called on to act.

If it had appeared in this case that the exigencies of business required the porter to discharge the cattle-trucks immediately, or that the plaintiff meant to put upon the company the charge of his cow, or to require the use of the truck for an unreasonable time, the case would have borne a different complexion; but I infer that all which the plaintiff wanted was, time to enable him either to soothe and quiet the cow, so that he might drive her home, or to secure her and so prevent her doing mischief, either to himself or to persons who might come in her way; and the porter could, without loss or inconvenience to the company or any other person, have kept the cow in the truck for that reasonable time. This, I think, he was therefore bound to do, and that as the mischief was attributable to his letting her at large, the company are liable. I am,

(1) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168.

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therefore, of opinion that the nonsuit was wrong, and that the verdict ought to be entered for the plaintiff for 15*l.*, the statutory value of the cow.

My Brother Blackburn concurs in this judgment.

Rule absolute.

Attorneys for plaintiff: *Pitman & Lane, for Chambers & Sons, Sheffield.*

Attorneys for defendants: *Cunliffe & Beaumont, for Lingard & Co., Manchester.*

IN THE MATTER OF THE CHARKIEH.

Jan 23.

Prohibition—Ship of Foreign Sovereign State—Jurisdiction of the Court of Admiralty.

4 A. 260
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The *C.* was a vessel belonging to the Khedive of Egypt, and had come to England to be repaired, with a cargo on board. She was not a man-of-war. Upon her trial trip she came into collision with and sank the *B.*; the owners of the *B.* caused her to be arrested by a warrant of the Court of Admiralty. An application having been made for a prohibition:—

Held, that the Court of Admiralty was the proper tribunal to determine whether the *C.* was entitled to the immunity allowed to the vessels of a sovereign state, and that a prohibition ought not to issue.

RULE, directed to the Judge of the High Court of Admiralty, and to the owners of the *Batavier*, calling on them to shew cause why a writ of prohibition should not issue, to prohibit that Court from further proceeding with the cause of damage instituted by or on behalf of the owners of the steamship *Batavier* against the Egyptian government steamship *Charkieh*.

On the 19th of October, 1872, the steamship *Charkieh* came into collision with the steamship *Batavier*, in the river Thames. The latter vessel, which belonged to the Netherlands Steamboat Company, sank and became a total loss. On the 21st of October a warrant of arrest in a cause of damage, instituted in the Court of Admiralty on behalf of the owners of the *Batavier*, was served upon the *Charkieh*, then lying in the port of London.

The affidavits stated that the *Charkieh* was the property of the

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Khedive of Egypt, and was a ship of the Egyptian branch of the Turkish navy, carrying the Ottoman naval pennant. She had been employed as a government packet, carrying the mails, passengers, and cargo between Alexandria and Constantinople, but she had been sent to England in order to be repaired, and in order to lessen the expense of the voyage she had brought a cargo from Egypt; but all freights and passage-money earned by her were ultimately accounted for to the Minister of the Interior of Egypt. She had been repaired, and at the time of the accident was on a trial trip. She had been advertised to sail for Alexandria with passengers and cargo. The Khedive exercises power and authority in Egypt; and levies taxes in that country. He is, however, a vassal of the Sultan of Turkey, to whom he pays tribute and owes homage.

The affidavits filed in shewing cause stated that the *Charkieh* was not a man-of-war, and carried only two signal guns, and from her construction was not adapted for warlike purposes.

Nov. 23. 1872. *Milward, Q.C.*, and *Clarkson*, shewed cause. Whether or not the Khedive is a sovereign prince, and whether or not merchant vessels belonging to foreign princes are entitled to the immunity allowed to vessels of war, the Court of Admiralty is peculiarly competent to decide questions of this nature. They are matters of international and maritime law, and that court has almost a special jurisdiction to decide questions arising on these branches of jurisprudence. [They were then stopped.]

Jan. 23. *Butt, Q.C.*, *Cohen*, and *Gibson*, in support of the rule. The prohibition ought to go, as the Court of Admiralty has no jurisdiction to entertain a suit against a foreign prince. All the cases on the subject of prohibition are collected in *Mayor of London* v. *Cox*. (1) It would appear from a passage in the opinion of the judges, as delivered by Willes, J., that where there is a defect of jurisdiction as distinguished from a want of power to try an issue, the prohibition may be applied for at any time. In that same case, it is shewn that a writ of prohibition at the suit of a party is not in the discretion of the superior court, but

(1) Law Rep. 2 H. L. 239, at pp. 278, 283.

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must be granted as a matter of right. *Burder* v. *Veley* (1), and *Gardner* v. *Booth* (2) are there recognized. *Howe* v. *Nappier* (3) shews that prohibition is granted ex debito justitiæ. After *Velthasen* v. *Ormsley* (4), *Clay* v. *Snelgrave* (5) and *Wharton* v. *Pits* (6), cannot be upheld. If the application were postponed until after sentence it might be too late: *Buggin* v. *Bennett.* (7) [They also cited *Sewell* v. *Jones* (8); *Re Aykroyd* (9); *Pease* v. *Chaytor.* (10) It was also discussed whether the Khedive was a sovereign prince; and whether the *Charkieh*, being neither a man-of-war, nor employed for the purposes of state, was entitled to the immunity granted to vessels employed for warlike and state purposes. On these points the following cases were cited: *Duke of Brunswick* v. *King of Hanover* (11); *De Haber* v. *Queen of Portugal* (12); *The Ticonderoga* (13); but as to them the Court gave no judgment.]

COCKBURN, C.J. We are of opinion that the rule for a prohibition should be discharged. The questions raised relate to international law, which is recognised by the municipal law of this country. One of its principles is that a sovereign prince or state cannot be summoned to answer a complaint made in a foreign court. It is alleged that this vessel belongs to the Khedive. But if she belongs to the Khedive (and this, for the purpose of the argument, I assume), she is found in the hands of other persons, and under circumstances which certainly lead to the inference that she is not a vessel of war, nor a vessel, at the time of the occurrence, in the employment of the Khedive, as a sovereign prince. There, therefore, is a further question, whether or not a vessel belonging to a foreign potentate, but not used as a vessel of state or a vessel of war, is entitled to the immunity which ships of war and ships used for the purposes of government enjoy. This is a question peculiarly within the province of the Court of Admiralty to decide. Why are we to hold that the Court of Admiralty cannot deal

(1) 12 A. & E. 233.
(2) 2 Salk. 549.
(3) 4 Burr. 1944.
(4) 3 T. R. 315.
(5) 1 Ld. Ray. 576.
(6) 2 Salk. 548.
(7) 4 Burr. 2035.
(8) 1 L. M. & P. 525.
(9) 1 Ex. 479.
(10) 1 B. & S. 658; 31 L. J. (M.C.) 1.
(11) 2 H. L. C. 1.
(12) 17 Q. B. 171, 196; 20 L. J. (Q.B.) 488.
(13) Swa. 215.

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with it? If it entertains the suit there is an appeal to the judicial committee of the Privy Council, a Court of the highest authority. I feel disinclined to grant a rule for a prohibition in a case where the facts are in doubt, and the court, whose jurisdiction is sought to be impeached, is just as competent to determine the question as we are. If the court finds contrary to the evidence in order to give itself jurisdiction, this Court would not be bound by its authority, or if it gave a manifestly erroneous decision, although not for the purpose of giving itself jurisdiction, this Court would be entitled to look into the circumstances. But both facts and law are within the jurisdiction of the Court of Admiralty, and that Court is perfectly competent to decide them.

BLACKBURN, J. I am also of opinion that this rule should be discharged. Prohibition is granted by this Court where an inferior court is exceeding its jurisdiction, and taking on itself to decide on some matter which is beyond its powers. Now, taking every fact brought before us on the part of the persons applying for the prohibition to be true, the case would be this: that the Khedive of Egypt is a sovereign prince—as I assume for present purposes, although that may be disputed hereafter—and is owner of the vessel in question; she was sent to this country for repairs; a collision then takes place in the Thames at the time the vessel was his property, and his officers were on board in possession of her. Now the question arises whether the Court of Admiralty, having jurisdiction to administer maritime law and international law against foreign vessels, could proceed with the cause of damage, because, by international law, such a ship is privileged, and cannot be proceeded against in a foreign court. There is authority for saying that courts of justice cannot proceed against a sovereign or a state, and I think there is also authority for saying they ought not to proceed against ships of war or national vessels; and it is obviously desirable that this rule should be established; otherwise, wars might be brought on between two countries. But there is another question—what is the liability of a vessel which is the property of a foreign state, when she causes damage by a collision to another vessel, she not being a ship of war, but a ship which happens to be national property, and apparently employed on a mer-

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cantile adventure? Does the circumstance of her being the property of a foreign state oust the jurisdiction of the Court of Admiralty? The case most favourable to the owner of the *Charkieh* is the case of *The Prins Frederik* (1), which was heard before Lord Stowell, and argued at great length, and he most cautiously abstained from committing himself to any opinion. But the government who were owners of that ship seized by the Admiralty, had very sensibly and properly agreed that they would refer the matter to him to decide as an arbitrator. The Khedive has in the present case, as I understand, made an offer to refer it to arbitration, but for some reason or other it went off, and now the case depends upon the question, whether or not, under the circumstances stated, the fact of the vessel being the property of the Khedive is a defence. On that Lord Stowell, as I said before, entertained an argument at great length, and avoided expressing any opinion; and when he, as the arbitrator, had made his award, he deliberately stated that the parties who claimed the salvage should at first apply to the ambassador, and they would have got it as matter of course; and it was very unbecoming to issue a warrant of arrest against a man-of-war belonging to a foreign power. Then he states that a nice question arose as to international law. Now we are asked to prohibit the Court of Admiralty entertaining that which Lord Stowell, perhaps the highest authority on these matters, declared was a difficult question of international law. It seems to me that this question can be better decided by a Court which has almost a peculiar jurisdiction over matters relating to international law. It does seem to me that the Court of Admiralty has jurisdiction to determine the facts, and to decide whether international and maritime law do allow the circumstances stated to be a defence to a claim against the *Charkieh;* and if that Court be wrong in its judgment the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law; and taking that view of it, I think the Court ought not to be prohibited.

MELLOR, J. I am of the same opinion. I do not think it neces-

(1) 2 Dod. 451.

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sary to add anything to what has been said by my Lord and my Brother Blackburn.

QUAIN, J. I give no opinion in this case, not having heard all the arguments in it.

Rule discharged. (1)

Attorneys for *Charkieh: Macleod & Watney.*
Attorneys for *Batavier: Clarkson, Son, & Greenwell.*

Jan. 24.

WAUGH *v.* MORRIS.

Charterparty — Contract — Illegality — Mens rea — The Contagious Diseases (Animals) Act, 1869 (32 & 33 *Vict. c.* 70), *s.* 78—*Order in Council prohibiting the Landing of Hay.*

5 PC 156
162-3.

By a charterparty made by defendant's agent in France defendant chartered plaintiff's ship, and it was stipulated that the ship should load a cargo of pressed hay at T., in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. Defendant's agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an Order in Council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The Order had been made before the charterparty was entered into, but neither party knew of it. After some delay defendant received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the defendant to elapse beyond the lay days. The plaintiff having brought an action for this detention of his ship, the defendant contended that the contract was for an illegal purpose, and therefore void:—

Held, that, although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and defendant was therefore liable for the demurrage.

DECLARATION on a charter party, by which plaintiff's ship *Castor* was chartered by one Jacques, for a voyage from Trouville to London, under which seventeen bales of pressed hay were shipped, according to terms of bills of lading, by which the hay was to be delivered at the port of London to order, which bills were

(1) The case is now pending in the Court of Admiralty.

indorsed to defendant, claiming eighteen days demurrage at London beyond the lay days, at 50*s.* a day, as per charter.

Pleas, inter alia, 7: That Trouville is a place in the territory of the French Republic, and that the hay agreed, under the charter-party and bill of lading, to be loaded on board the plaintiff's vessel, was hay to be loaded at Trouville, and that by the charter-party and bill of lading, the plaintiff agreed to bring the hay so loaded at Trouville into a port of Great Britain, to wit, London, and to deliver the same there, in accordance with the usage and custom of the port, that is to say, to land the hay at a proper landing-place within the port of London, and to deliver the same when so landed there. That at the time of the making of the charterparty and bill of lading, during all the time that the ship with the hay on board was and was detained in the port of London, there was in force an Order in Council, made by Her Majesty's Privy Council, dated the 9th of March, 1871, under the Contagious Diseases (Animals) Act, 1869, to wit: 1. "This order shall take effect from immediately after the 13th of March, 1871, and words in this order have the same meaning as in the Act of 1869. 2. Cattle brought from any place in the territory of the French Republic, or from any place in Belgium, shall not be landed at any port or place in Great Britain . . . 4. The following articles, brought from any place as aforesaid, shall not be landed at any port or place in Great Britain . . . . hay." And at the time of making the charterparty and bill of lading, and the loading the said hay, and bringing the same in the plaintiff's ship into the port of London for the purpose of landing the same within the port, according to the said custom and usage of the port, the plaintiff was a British subject, and was bound by the provisions of the Act of Parliament, and of the Order in Council.

Issue joined.

At the trial before Cockburn, C.J., at the sittings in London after Hilary Term, 1871, the plaintiff had a verdict for 45*l.*, the amount claimed, being for eighteen days demurrage at 50*s.*: with leave to move to enter a verdict for defendant, if the facts proved the plea of illegality.

A rule was afterwards obtained accordingly, on the ground that the contract sued on was illegal, and could not be enforced,

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being for and relating to an illegal purpose, and contrary to the statutes.

The facts are sufficiently stated in the judgment.

Nov. 18, 1872. *Butt, Q.C.*, and *R. E. Webster* shewed cause. The rule was obtained on the ground that the contract was illegal and void, ab initio, by reason of the Order in Council, made under 32 & 33 Vict. c. 70, s. 78 (1); but that is not so: the order only prohibits the landing; there is nothing illegal in the contract; the charterparty is to London, but there is not one word about landing in it or in the bill of lading. It could, therefore, have been carried out legally at once, by taking the hay direct from the ship, and re-shipping, which was ultimately done. The contract was not necessarily illegal, and certainly not illegal to the knowledge of the parties. If it can be carried out legally, each party is bound by it: *Haines* v. *Busk* (2); *Lewis* v. *Davison* (3); *The Teutonia* (4). The customs licence might have been obtained immediately; and even if this had taken time to procure, the defendant would be liable for the delay: *Hill* v. *Idle* (5).

Nov. 21. *Milward, Q.C.*, and *Maclachlan*, in support of the rule. The question is what was the intention of the parties with regard to the hay when they entered into the charterparty. This intention may be gathered, not only from the contract in the charterparty, but may be supplied by parol evidence: *Collins* v. *Blantern.* (6) When the parties entered into the charterparty it must have been their intention that it should be landed in the port of London. The charterparty only stipulates that the hay shall be carried to London; but there was a further parol contract with the master that it should be landed at the wharf at Deptford Creek. The master was, therefore, bound to take the ship to the place of discharge: *Brereton* v. *Chapman* (7); *The Felix.* (8) The parol contract and charterparty shew that the contract was illegal, because it was in contravention of the statute 32 & 33 Vict. c. 70, s. 78,

(1) See post, p. 206, n. (1).
(2) 5 Taunt. 521.
(3) 4 M. & W. 654, 657.
(4) Law Rep. 4 P. C. 171, 181.
(5) 4 Camp. 327.
(6) 1 Sm. L. C. 263.
(7) 7 Bing. 559.
(8) Law Rep. 2 A. & E. 273.

and the Order in Council made thereunder. (1) To perform the contract and unload the ship would have been an illegal act: *Elliott* v. *Richardson* (2); *Forster* v. *Taylor* (3); and the licence afterwards obtained to export the hay does not purge the original illegality: *Muller* v. *Gernon*. (4) It was clearly illegal to perform the contract as the parties intended it should be performed: *Cunard* v. *Hyde* (5); and as the vessel never was taken to the wharf at Deptford Creek, and the lay days did not commence until the vessel was at the place of discharge, the plaintiff cannot recover in the action.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.) was delivered by

BLACKBURN, J. This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice the material facts appeared to be, that the charterparty was made in France on the 7th of October, 1871, between the agent of the defendant and the master of the ship.

By the charterparty it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London; and a term in the charterparty was to the effect that all cargo should be brought and taken from the ship *alongside*. (6)

The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in

(1) See post, p. 206, n. (1).
(2) Law Rep. 5 C. P. 744.
(3) 5 B. & Ad. 887.
(4) 3 Taunt. 394.
(5) 2 E. & E. 1; 29 L. J. (Q.B.) 6.
(6) Article IV. of the charterparty was: "Le chargement sera prêt à livrer sous le palan."

(5) 2 E & E 1 6 Jan 1861

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Council, made under the authority of the Cattle Diseases Act (1), France was declared to be an infected country, and it was made illegal to *land* in Great Britain any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done (2), but during the interval eighteen days beyond the lay-days elapsed, and it was for this detention that the plaintiff recovered.

It appeared that the Order in Council had been made and published before the charterparty was entered into, but that in fact neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas term before my Lord Chief Justice, my Brother Mellor, and myself, when the Court took time to consider.

We are of opinion that the rule should be discharged. The charterparty provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had

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(1) By 32 & 33 Vict. c. 70, s. 78, the Privy Council may from time to time, by order, make such regulations as they think expedient for prohibiting or regulating the landing of any hay, straw, fodder, or other article brought from any place out of the United Kingdom, whereby it appears to the Privy Council contagion or infection may be conveyed to animals, or for causing the same to be destroyed, if landed. If any person lands, or attempts to land, any hay, straw, fodder, or other article in contravention of any such order, the same shall be forfeited in like manner as goods the importation whereof is prohibited by the Acts relating to the customs are liable to be forfeited; and the person so offending shall be liable to such penalties as are imposed on persons importing or attempting to import goods the importation whereof is prohibited by the Acts relating to the Customs, without prejudice to any proceeding against him under this Act or any such order, but so that no person be punished twice for the same offence.

The Order in Council of the 7th of March, 1871, was in the terms set out in the seventh plea.

(2) All that was necessary was an order from the Customs for permission to transfer the hay for export to some other vessel named.

no right to refuse, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable. See *The Teutonia* (1), a case which would have been precisely in point, if the Order in Council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shewn by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce* v. *Brooks* (2), it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell* v. *Robinson* (3), "for the express purpose of a violation of the law." But in the present case the shipowner never did even

(1) Law Rep. 4 P. C. 171. (2) Law Rep. 1 Ex. 213.
(3) 3 M. & W. at p. 442.

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contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend, that if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods: for there would have been a want of mens rea. And it seems to us that the mens rea is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

Attorneys for plaintiff: *Ingledew, Ince, & Greening.*
Attorneys for defendant: *Ashurst, Morris, & Co.*

MALCOLM *v.* HODGKINSON.

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Jan. 31.

Practice—Security for Costs—Insolvent Plaintiff suing as Trustee for another—Liquidation—Receiver.

The plaintiff, in an action of trover, filed a petition for liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869 (33 & 34 Vict. c. 71); and a receiver was appointed under Rule 260 of the Bankruptcy Rules, 1869:—

Held, that the plaintiff was rightly ordered to give security for costs.

ACTION of trover for goods.

After the commencement of the action, the plaintiff filed a petition for liquidation by arrangement under the Bankruptcy Act, 1869 (33 & 34 Vict. c. 71), s. 125; and a receiver of his property was appointed under Rule 260 of the Bankruptcy Rules, 1869. An order was made by Honyman, J., at Chambers, staying proceedings in the action till the plaintiff should give security for costs.

Edward Clarke moved (1) to set aside the order. There is no ground for requiring the plaintiff to give security for costs. Mere poverty or a state of insolvency is no reason for requiring it: 2 Chitty's Archbold, p. 1404, 11th edit.

[BLACKBURN, J. No. But where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs. In a case of liquidation, the property of the debtor vests in the trustee on appointment, and is divisible among creditors as in bankruptcy, by s. 125, subs. 5, of the Bankruptcy Act. The debtor, therefore, can only sue for the benefit of his trustee and creditors.]

The same may be said of bankruptcy; yet the bankruptcy of a plaintiff is no ground for requiring security for costs: *Stead* v. *Williams*. (2)

[BLACKBURN, J. That is because the bankruptcy may be pleaded, and so the action be stopped altogether. Liquidation cannot be pleaded.]

(1) In the Bail Court, before Blackburn, Lush, and Archibald, JJ.
(2) 5 C. B. 528; 17 L. J. (C. P.) 109.

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Willis, who appeared to shew cause in the first instance, was not called upon.

PER CURIAM. The order appealed against was quite right.

Rule refused.

Attorneys for plaintiff: *Kimber & Ellis.*
Attorneys for defendant: *Duffield & Braby.*

Feb. 17.

THE QUEEN *v.* WARD.

Quo Warranto—Election to Office—Irregularity not affecting the Result—Discretion of the Court.

The Court will not allow an information in the nature of a quo warranto to be filed to try the title to an office, merely because there has been an irregularity in the election, in the absence of bad faith, and where the result of the election has not been affected.

At the election of a local board of health, the chairman being about to go out of office, another person was appointed under 11 & 12 Vict. c. 63, s. 21, to act as returning officer in case of the chairman being nominated for re-election. Nomination papers were sent in due course to the chairman, and amongst them one nominating him as a candidate. He nevertheless continued to receive the nomination papers, and when all had been delivered prepared the voting papers, inserting therein the names of the persons nominated as required by s. 24. He did not further act as returning officer; and was returned as re-elected. There was nothing to shew that the names were inserted in the voting papers otherwise than in their proper order, or that the result of the election had been in any way affected by the voting papers having been prepared by the chairman instead of by the person appointed to act as returning officer:—

Held, that, assuming the chairman's conduct to have been an irregularity, the Court in its discretion ought not to allow an information to be filed against his election, no mischief having been done.

If a chairman were wilfully and contumaciously to act in his own election, the Court might allow an information to go.

RULE, calling upon the defendant to shew cause why an information in the nature of a quo warranto should not issue to shew by what authority he claimed to be a member of the local board of health for the district of Sheerness.

Jan. 31. *Prentice, Q.C.*, and *E. L. O'Malley*, shewed cause. (1)

(1) In the Bail Court before Blackburn, Lush, and Archibald, JJ.

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Crump supported the rule.

The facts and arguments sufficiently appear in the judgment of the Court.

The following authorities were cited in addition to those referred to in the judgment: *Reg.* v. *White* (1); *Reg.* v. *Owens* (2); *Reg.* v. *Parkinson* (3); *Reg.* v. *Morgan* (4); Tidd on Corporations, vol. 1, p. 369; Rawlinson on Corporations, p. 360, 5th ed.

Cur. adv. vult.

Feb. 17. The judgment of the Court was delivered by

BLACKBURN, J. This was a rule obtained for leave to file an information in the nature of a quo warranto for the office of member of a local board of health, against which cause was shewn in the sittings of last term before my Brothers Lush, Archibald, and myself, when the Court took time to consider of their judgment. We are of opinion that the rule ought to be discharged.

It is convenient, in the first place, to state the facts as appearing on the affidavits:—The defendant was chairman of the local board, and consequently under the 21st section of 11 & 12 Vict. c. 63, he was to perform all the duties in conducting and completing the elections for members of the local board. That section, however, contains a provision that in case the chairman from illness or other sufficient cause shall be unable to act, or shall be absent, or shall refuse to act, some other person who shall be appointed by the local board of health shall exercise or perform such of the said powers and duties as then remain to be exercised or performed. It was known that three members of the local board, one of whom was the defendant, were to go out of office; and that in the event of the defendant being again nominated as a candidate he would be incapable of acting as returning officer in his own election. On the 29th of August the local board came to a resolution that another member of the local board, of the name of Felkin, should be appointed under this section to act in the event of Ward being nominated and accepting the nomina-

(1) Law Rep. 2 Q. B. 557.
(2) 28 L. J. (Q.B.) 316.
(3) Law Rep. 3 Q. B. 11.
(4) Law Rep. 7 Q. B. 26.

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tion. The next step to be taken was, under section 23, to prepare and publish a notice of the election. Ward, as chairman, did accordingly, on the 7th of September, publish a notice fixing the days of election for the 29th and 30th of September, directing that the nomination papers should be delivered at his own house, and fixing the 16th of September as the last day on which nomination papers should be received. On the 10th of September a nomination paper nominating Ward as a candidate was delivered at his house, and we think it must be considered that he on that day accepted the nomination and became a candidate, and ought therefore from that date to have ceased altogether to act, and to have called upon Felkin to perform all the duties which yet remained to be performed. He did not, however, immediately do so, but continued to receive the nomination papers, and on the 16th of September there were more nomination papers received than there were vacancies. The 24th section requires that in such a case the chairman should cause voting papers to be filled up and insert therein the names of all the persons nominated in the order in which the nomination papers were received. Instead of leaving this to be done by Felkin, which would clearly have been the right course, Ward himself filled up the form of a voting-paper and sent it to the printer, with directions to send the papers when printed. This was done, and from that time forward everything was done by Felkin. The election was duly held, and Ward was elected and returned by Felkin.

There was no affidavit in support of the rule affording any evidence that the names of the candidates were not inserted on the voting paper in the order in which the nomination papers were received, and there was the positive and express affidavit of Ward that they were inserted in that order. And there was no suggestion on the affidavits that the election would have been in any respect different if Felkin had begun to act on the 10th of September, as soon as Ward became a candidate, instead of delaying to act until the voting paper had been sent to the printer. It was, however, contended that, inasmuch as Ward did act as chairman after he had become a candidate, his election was in point of law void, however short the time was during which he acted, and however immaterial in the result his acting turned

out to be. We are not prepared to express an opinion on this, as we all agree that the point is one of sufficient difficulty to make it proper to let the writ go, in order that it might be raised on the record, if the only question were whether the election was strictly legal.

But that is not the only question. The power of the Master of the Crown Office as attorney for the Queen in the Court of Queen's Bench had before the Revolution been much abused, and by Stat. 4 & 5 W. & M. c. 18, s. 2, it was enacted that he should not "without express order to be given by the Court in open Court" exhibit or file any information. An information in the nature of quo warranto, though not expressly named in this statute, is within it, whatever be the nature of the franchise in respect of which the information is to be filed. Before the Reform Bill the return of Members of Parliament in a very large number of boroughs depended upon the municipal corporation, which made quo warrantos for municipal franchises of exceptional importance, and there are subsequent statutes regulating the mode of proceeding in quo warranto for municipal offices, within which the present case would not fall. But the very object of requiring that the information should not be filed without express order by the Court of Queen's Bench made in open Court, was that the Court might in its discretion refuse to file an information where it would be vexatious so to do. And we think that, exercising our discretion in the way in which it has been for many years exercised by this Court, we ought to refuse to make the order in the present case. In *Rex* v. *Stacey* (1) Lord Mansfield, speaking in 1785, says: "I remember when it was so much the practice of the Court to grant quo warranto informations as of course, that it was held prudent never to shew cause against the rule, for fear of disclosing the grounds on which the party went. But now since these matters have come more under consideration, it is no longer a motion of course, and the Court are bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation." We do not rely on the particular circumstances in that case as being in point, but cite it for the principle laid down by Lord Mansfield, which we think has been uniformly acted upon

(1) 1 T. R. 1.

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since. We pass over the intermediate cases to *Rex* v. *Parry* (1) in 1837. There, in the considered judgment of the Court, it is said: "It was, in effect, asserted that wherever a reasonable doubt is raised as to the validity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous) which has turned upon the interest, motives, or conduct of the relator, proceeds upon the principle of the Court's discretion; however clear in point of law the objection may have been to the party's abstract right to retain his office, yet the Court has again and again refused to look at it or interfere upon one or other of these grounds." Later in the judgment, the grounds are stated on which the Court exercised their discretion in that case. "On the one hand, if the rule be made absolute, the dissolution of the corporation may at least be reasonably apprehended." We may at once say that this was a greater inconvenience than any to be apprehended in the present case, but what follows seems to us quite applicable to the present case. "On the other, it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent, or indirect motive for the acts complained of as irregular, nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go the length of suspecting that a single vote has been won or lost, or that the burgess-list would have varied in a single name." "In fact neither claim nor objection, as regarded the Monmouth Ward, was made to the overseers' list. We do not say that the court of revision had, therefore, no duties to perform; but in fact they were not called upon to perform any; and the defective constitution of the court has been, in all respects, an immaterial circumstance."

One argument, much relied on in support of the rule, was, that though Ward as chairman had performed no duty except the almost mechanical one of filling up the voting-paper with the candidates' names, in the order in which the nomination-papers were received, yet the chairman might have had to consider the qualification of those who signed the nomination-papers, a matter of a judicial, or at least quasi-judicial nature. Probably, had he been called upon

(1) 6 A. & E. 810, at pp. 820, 822.

so to do, he would have perceived the propriety of holding his hand, and calling on Felkin to begin to act; but, as it is, we think in exercising our discretion we may well adopt the view of the King's Bench in *Rex* v. *Parry* (1), and say that, as in fact he was not called upon to perform any such duty, the irregularity has been in all respects an immaterial circumstance.

The next case that we would refer to is that of *Reg.* v. *The Rector of Lambeth* (2), and I refer to it principally because the office there in question was not a corporate office, and that the inconvenience which would have been sustained from ousting the churchwarden would only have been, that the quiet of the parish would be disturbed by a new election, when the former election was substantially right, though irregular. Yet the Court discharged the rule, on the ground that nothing was stated to shew that the result of the election was different from what it would have been if the irregularity had not taken place. The same principle was acted upon in *Rex* v. *Goole* (3), and in the very recent case of *Reg.* v. *Cousins* (4), in this Court, a short time before the present rule was argued.

We think, therefore, that seeing that the mistake committed here has produced no result whatever; that the same persons have been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad as I may say on special demurrer; we ought, in the exercise of our discretion, to refuse leave to disturb the peace of this district by filing this information.

It is worth saying that if, in any future case, it should appear that the chairman wilfully and contumaciously acted at all in his own election, the Court might well, in its discretion, order the filing of an information in order to check such a practice. Nothing we have said is intended to apply to such a case.

Rule discharged.

Attorneys for relator: *Brook & Chapman.*
Attorneys for defendant: *Eyre & Co.*

(1) 6 A. & E. 810.
(2) 8 A. & E. 356.
(3) 4 L. T. (N.S.) 322.
(4) See note at the end of this case, p. 216.

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RULE for an information in the nature of a quo warranto calling upon James Cousins to shew by what authority he claimed to exercise the office of a guardian of the poor for the borough of Plymouth.

It appeared from the affidavits that at the election in May, 1872, in certain parishes of the borough the votes were taken in the following manner:—A list having been made of the candidates, each voter was required to go through the list, marking or scratching the names of those for whom he wished to vote. But the voter was only allowed to go through the list once, so that if when he got to the end he had not exhausted his votes, his votes not so given would be lost. It was not shewn that at the election in question any voter had had any votes thrown away, or that the result of the election had been in any way affected.

Kingdon, Q.C., shewed cause. He contended that, whether the mode of voting was regular or irregular, no mischief had been occasioned, and therefore the Court ought not to interfere. He cited *Darbey* v. *Reg.* (1); *Reg.* v. *Hammersmith* (2); *Reg.* v. *Hodson* (3); *Rex* v. *Parry* (4); *Reg. v. Goole* (5); *Rex* v. *Rector of Lambeth.* (6)

Cole, Q.C., and *Pinder*, supported the rule. They contended that the mode of election was improper, because it made a scrutiny impossible, and provided no means of testing the right of any person to vote; and that the invalidity of the election was a sufficient grievance to any inhabitant and ratepayer to entitle him to an information. They cited *Rex* v. *St. James, Clerkenwell* (7); *Rex* v. *Bumstead.* (8)

BLACKBURN, J. There is no doubt that, according to the rules upon which this Court ordinarily acts, this rule must be discharged with costs. Ever since the statute 4 & 5 W. & M. c. 18, s. 2, this Court has had a discretion to exercise as to allowing an information in the nature of a quo warranto to be filed by the Master of the Crown Office; and especially has that discretion been exercised in the case of annual offices. The rule always acted upon is, that if the right person has been elected, and it is not shewn that any one else has been kept out, nor the result of the election in any way affected, the Court will not allow the writ to issue. I express no opinion upon the question which has been raised as to the propriety of the mode of election. If a real question arises, in a case in which the result of the election is affected by the mode adopted, it may then properly come before this court for decision. We should, of course, not allow the question to be raised by any one who chose wilfully to pass over names on the list in order to raise it. Any such attempt might perhaps be a contempt of court. What we are here asked to do is to give an opinion in the abstract upon the propriety of a certain mode of conducting the election. And I entirely agree with what I have often heard said by Crompton, J., that this Court sits

(1) 12 Cl. & F. 520.
(2) 3 B. & S. 504, n.
(3) 4 Q. B. 648, n.; 11 L. J. (Q.B.) 219.
(4) 6 A. & E. 810.
(5) 4 L. T. (N.S.) 322.
(6) 8 A. & E. 356.
(7) 1 A. & E. 317.
(8) 2 B. & Ad. 699.

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to decide controversies, not to give advice. I therefore decline to express any opinion.

LUSH, J. I agree that we ought not to express any opinion upon this mode of election. The case of *Reg.* v. *Rector of Lambeth* (1) was a much stronger one than the present, and there the Court refused to interfere on the express ground that the result of the election was not shewn to have been affected.

ARCHIBALD, J. I am of the same opinion. As to the question which has been argued, I say nothing. But in our discretion we ought not to interfere, for it is not shewn that the result of the election is wrong, or that any one inadvertently passed over the name of any candidate or lost a vote.

Rule discharged.

Attorneys for relator: *Fox & Robinson.*
Attorneys for defendant: *Vizard, Crowder, & Anstie.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 4.

CRONSHAW *v.* THE WIGAN BURIAL BOARD.

Burial Fees—Right of Incumbent of "New Parish"—58 *Geo.* 3, *c.* 45; 59 *Geo.* 3, *c.* 134—19 *&* 20 *Vict. c.* 104, *s.* 14; 20 *&* 21 *Vict. c.* 81, *s.* 5.

In 1851, the church of St. T. was built and consecrated, and in 1852 a district was assigned to it by Order in Council (as a chapel of ease) under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, s. 16, out of the ancient parish of W. At that time the deceased inhabitants were all buried in the parish churchyard. By the Act of Consecration and Order in Council authority was given to perform baptisms marriages, and burials in the new church, and the fees were to be received by the incumbent of the district.

In 1854, the plaintiff was appointed incumbent of St. T.; and a burial ground was then provided for the whole parish, including St. T.'s district, which contributed to the rates out of which the ground was provided; and in 1856, the ground and a chapel on it were consecrated, and a burial board appointed, the old churchyard being closed. At that time G. was rector of the parish of W. In 1864 G. resigned, and B. was appointed rector. The plaintiff then claimed the right to perform the burial service over such of the parishioners of St. T. as were buried in the burial-ground, and to have the fees:—

Held (affirming the judgment of the Queen's Bench), that the district of St. T. became a distinct and new parish in 1856 under s. 14 of Lord Blandford's Act (19 & 20 Vict. c. 104), and was a "new parish" within s. 5 of 20 & 21 Vict. c. 81; and that the plaintiff, as incumbent of the district, was entitled to the right he claimed, under the above sections of the two Acts, on the resignation of G. the incumbent of the old parish.

ERROR from the judgment of the Queen's Bench given for the plaintiff on a special case.

(1) 8 A. & E. 356.

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1. The action was for the recovery of fees claimed to be payable by the defendants to the plaintiff for burials in the burial ground provided by the defendants for the borough and township of Wigan, under the statutes relating to the burial of the dead, between 11th of September, 1869, and 23rd of March, 1870.

2. The plaintiff declared for money received by the defendants to his use, and the defendants pleaded never indebted.

3. The rectory and ancient parish of Wigan comprises the borough and township of Wigan and the several outlying townships, and until a burial ground was provided, as after mentioned, the remains of the inhabitants of the borough and township, and of such of the outlying townships as had not burial grounds attached to their respective churches, were interred in the churchyard of the ancient parish church, and on all such interments a burial fee was payable by the custom of the parish, and the rector was alone authorized and entitled to perform the rite of burial and to receive the fees.

4. In 1851 the church of St. Thomas was built and consecrated in the borough and township of Wigan as a chapel of ease, under the statutes 43 Geo. 3, c. 108, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134. And by the sentence of consecration of the 1st of October, 1851, which recited that the ground inclosed round the church was not intended for interments, liberty was given to celebrate divine service and perform all other divine offices usually performed in churches.

5. The plaintiff was appointed incumbent of the church of St. Thomas on the 25th of March, 1854.

6. By an Order of Her Majesty in Council made on the 11th of February, 1852, upon the recommendation of the commissioners for building new churches under s. 16 of the said statute 59 Geo. 3, c. 134, and under and by virtue of any other power or authority in that behalf vested in Her Majesty and the said commissioners, a particular district was duly assigned to the church of St. Thomas; and the Order in Council authorized banns of matrimony to be published, and marriages, baptisms, churchings, and burials to be solemnized and performed in the church of St. Thomas, and directed that all the fees to arise therefrom should be paid and belong to the incumbent of such church for the time

being. A description of the bounds of the said district so assigned was also then duly enrolled in the Court of Chancery and registered in the office of the registry of the diocese as required by the statutes in that behalf; and a copy of the said order and of the said description of the boundaries so assigned as aforesaid was inserted in the *London Gazette* on the 24th of February.

7. The plaintiff contends that from and after the passing of the New Parishes Act, 1856 (19 & 20 Vict. c. 104), by s. 14, the district so assigned to the church of St. Thomas became a separate and distinct parish for ecclesiastical purposes such as is contemplated in s. 15 of the New Parishes Act, 1843 (6 & 7 Vict. c. 37), but as this is not admitted by the defendant the parties have agreed to call St. Thomas throughout the remainder of this case a "district" without prejudice to the question which is hereby submitted to the decision of the Court.

8. There has never been any burial ground belonging to the district of St. Thomas, nor has any vestry or meeting in the nature of a vestry of the district appointed any burial board, or provided a burial ground; but the remains of the parishioners and inhabitants thereof continued to be interred in the burial ground of the ancient parish church, until a burial ground was provided by the defendants for the borough and township of Wigan.

9. The district of St. Thomas does not separately maintain its own poor, but lies wholly within the borough and township of Wigan, which has separate overseers of the poor, and separately maintains its own poor.

10. In the year 1854, under the provisions of the various statutes relating to the burial of the dead, a burial board for the borough and township of Wigan was duly established, and the board afterwards duly provided under the statutes a burial ground for the borough and township.

11. In the year 1856, the ancient churchyard of the parish of Wigan was closed, by order of the Secretary of State.

12. The burial ground so provided by the burial board was, with a chapel erected thereon, on or about the 13th of August, 1856, consecrated, from which time it became the burial ground for the borough and township of Wigan, within the meaning and according to the provisions of the statutes

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13. The district of St. Thomas contributed to the rates out of which this burial ground was provided.

14. At the time when this burial ground was provided and consecrated, the Rev. H. J. Gunning was rector of the parish of Wigan; but on his resignation, the Hon. and Rev. G. T. O. Bridgeman, on the 22nd of October, 1864, became rector.

15. The plaintiff as incumbent of the district of St. Thomas, has since the avoidance of the rectory of Wigan, next after the passing of the New Parishes Act, 1856 (19 & 20 Vict. c. 104) claimed, under the statute 20 & 21 Vict. c. 81, s. 5, to be entitled to perform, and has offered to perform the burial service in the burial ground provided by the burial board, over the remains of the parishioners or inhabitants of the district of St. Thomas, and also to be entitled to receive the same fees in respect of such burials, as if the burial ground were exclusively the burial ground of the district of St. Thomas.

16. From the 24th of February, 1868, until the 10th of September, 1869, the defendants allowed the plaintiff to perform the religious service in the burial in the defendants' burial ground of the remains of the parishioners and inhabitants of the district of St. Thomas, and paid to him the fees; but, since that, the defendants, in consequence of a claim to the same fees being made by the rector of Wigan, have refused to allow the plaintiff to perform any such religious service in the defendants' burial ground, and have retained the fees until the question between the plaintiff and the rector is decided.

17. The Court was authorized to amend the pleadings if necessary, and to draw any proper inferences of fact.

The questions for the opinions of the Court were, whether the plaintiff is entitled to perform the services on the burial of the inhabitants of the district of St. Thomas, in the defendants' burial ground, and to receive the fees.

The following statutes and sections are necessary for the due report of the case:—

59 G. 3, c. 134, s. 16: "It shall be lawful for the commissioners, in the same manner and with the like consents as are required in case of division into ecclesiastical districts under the said recited Act [58 G. 3, c. 45] or this Act, to assign a particular district to any chapel of ease or parochial chapel already

existing, or to any chapel built, or which may hereafter be built or acquired under the powers of the said Act, or this Act; and such district shall be under the immediate care of the curate appointed to serve such chapel, but subject, nevertheless, to the superintendence and control of the incumbent of the parish church; and all such curates shall be nominated by the incumbent of the parish to the bishop for his licence, except where the right of nomination shall already be legally vested in any other person or persons possessing such right of nomination, and in every such case by the person or persons possessing such right of nomination; subject to all the laws in force relating to stipendiary curates, except as to the assigning of salaries to such curates: Provided always, that it shall be lawful for the commissioners, with the consent of the bishop of the diocese, to determine whether any and what part or proportion of the fees or dues for marriages, baptisms, churchings, and burials shall be assigned to any such curate, and whether banns of marriage shall be published, and marriages or baptisms, churchings or burials, shall be solemnized or performed in any such chapel or not; and in cases in which marriages shall be allowed in any such chapel, the commissioners shall cause the boundaries of the district assigned to such chapel to be enrolled in the High Court of Chancery, and in the office of the Registry of the Diocese, anything in the said recited Act to the contrary notwithstanding. . . ."

6 & 7 Vict. c. 37, s. 15: "When any church or chapel shall be built, purchased, or acquired in any district constituted as aforesaid, and shall have been approved by the said commissioners, by an instrument in writing under their common seal, and consecrated as the church or chapel of such district, for the use and service of the minister and inhabitants thereof, such district shall, from and after the consecration of such church or chapel, be, and be deemed to be, a new parish for ecclesiastical purposes, and shall be known as such by the name of the new parish of instead of the district of according to the name so as aforesaid fixed for such district; and such church or chapel shall become and be the church of such new parish accordingly; and any licence granted by the bishop, licensing any building for divine worship as aforesaid, shall thereupon become void; and it shall be lawful to publish banns of matrimony in such church, and, according to the laws and customs in force in this realm, to solemnize therein marriages, baptisms, churchings, and burials, and to require and receive such fees upon the solemnization of such offices or any of them as shall be fixed by the Chancellor of the Diocese in which such new parish shall be situate, and which fees, and also the fees for churchings, to be received as aforesaid by the minister of such district, such chancellor is hereby empowered and required to fix accordingly; and the like Easter offerings and dues may be received within the limits of such new parish by the perpetual curate thereof, as are and were, at and before the time of the passing of this Act, payable to the incumbent of the church of the principal parish of which such new parish originally formed a part; and the several laws, statutes, and customs in force relating to the publication of banns of matrimony, and to the performance of marriages, baptisms, churchings, and burials, and the registering thereof repectively, and to the suing for and recovering of fees, oblations, or offerings in respect thereof, shall apply to the church of such new parish, and to the perpetual curate thereof for the time being: Provided always, that it shall not

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be lawful for any such minister or perpetual curate to receive any fee for the performance of any baptism within his district or new parish, as the case may be, or for the registration thereof."

19 & 20 Vict. c. 104, s. 14: "Wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, according to the laws and canons in force in this realm, are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is, by such authority, entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first recited Act [6 & 7 Vict. c. 37], and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the said firstly and secondly recited Acts [6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94] as amended by this Act, relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned Acts."

20 & 21 Vict. c. 81, s. 5: "The vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district, not separately maintaining its own poor, and which has had no separate burial ground, may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said Acts and this Act, if such parish, new parish, township, or district had had a separate burial ground before the passing of the said Act of the 18 & 19 years of Her Majesty: Provided always, that all the powers of any other vestry, or meeting, and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid; and until a burial ground shall be so provided, as aforesaid, and consecrated for any new parish or district created, or to be created, pursuant to the provisions of the 6 & 7 Vict. c. 37, the 7 & 8 Vict. c. 94, and the 19 & 20 Vict. c. 104, or any, or either of them, and to which the said Acts, or any, or either of them, may apply, the incumbent of such new parish or district (if any burial ground has been or shall be provided under the herein-recited Acts for the burial of the dead, or any, or either of them, for any parish or parishes out of rates to which such new parish or district, or any part thereof, shall have contributed, or contribute, or be liable,) shall, with respect to the burial in such last-mentioned burial ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties, and have the same rights, privileges, and authorities, and be entitled to the same fees, and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties, and be entitled to the same fees, in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district, subject, nevertheless, to all provisions to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said Burial Acts, or any, or either of them:

Provided, also, that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton without the consent of such incumbent, clerk, or sexton respectively."

Nov. 14, 1871. The Court of Queen's Bench (Cockburn, C. J., Mellor, Lush, and Hannen, JJ.) after hearing *Manisty, Q.C.*, for the plaintiff, and *Holker, Q.C.*, for the defendants, gave judgment for the plaintiff, without pronouncing any formal judgments, on the ground that the district of St. Thomas became a new parish under s. 14 of 19 & 20 Vict. c. 104, and the plaintiff therefore was entitled under s. 5, of 20 & 21 Vict. c. 81, to the burial fees on the death of the incumbent of the old parish existing at the passing of the Act.

Feb. 4, 1873. *F. Bristowe, Q.C.* (*McConnell* with him), for the defendants, went through the following statutes and sections: The Church Buildings Acts, 58 Geo. 3, c. 45, ss. 21, 24, 25, 27, 28; 59 Geo. 3, c. 134, ss. 12, 16, 17, 18; 3 Geo. 4, c. 72, s. 26; 2 & 3 Vict. c. 49, ss. 2, 5; 14 & 15 Vict. c. 97, ss. 1, 4—6; the Peel Acts, 6 & 7 Vict. c. 37, ss. 9, 10, 11, 14, 19, 29; 7 & 8 Vict. c. 94; and Lord Blandford's Act (19 & 20 Vict. c. 104) extending them; and the Burial Acts, 15 & 16 Vict. c. 85, ss. 2, 32, 35, 36, 39; 18 & 19 Vict. c. 123; and 20 & 21 Vict. c. 81. He contended that the district of St. Thomas, having been formed under 59 Geo. 3, c. 134, was not within s. 14 of 19 & 20 Vict. c. 104; and did not become by that section a separate and distinct parish for ecclesiastical purposes within s. 15 of 6 & 7 Vict. c. 37. But that, even if it became such a parish, the plaintiff was not entitled under s. 5 of 20 & 21 Vict. c. 81, to the burial fees; as the second clause in that section was governed by the first, and only applied where a separate burial board had been appointed for the district, which was not the present case, one board for the whole of the original parish being the only board appointed. He cited *Hornby* v. *Toxteth Park* (1), *Day* v. *Peacock* (2), and *Reg* v. *Walcot* (3).

Manisty, Q.C. (with him *Forbes*), for the plaintiff, contended that the district of St. Thomas, having been formed in 1852, under s. 16

(1) 31 Beav. 52; 31 L. J. (Ch.) 643.
(2) 18 C. B. (N.S.) 702; 34 L. J. (C.P.) 225.
(3) 2 B. & S. 555; 31 L. J. (M.C.) 221.

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of 59 Geo. 3, c. 134, and the Order in Council, was not a separate and distinct parish for ecclesiastical purposes at the time of the passing of 19 & 20 Vict. c. 104; and, inasmuch as the Order in Council permitted all the offices of the church to be performed in the church, and the fees to go to the incumbent, the district came directly within the terms of s. 14 of that Act; and is a district within s. 15 of 6 & 7 Vict. c. 37; and then by force of 20 & 21 Vict., c. 81, s. 5, inasmuch as the district contributes to the rates for the burial ground of the parish at large, the plaintiff, as incumbent of the district, became, on the death of the old incumbent of the mother parish, entitled to the burial fees for the burials of his own parishioners. The point had virtually been already decided by Dr. Lushington, as Dean of Arches, in *Gough* v. *Jones* (1), the case of St. Mary, Shrewsbury, where it was held that, where a separate district had been constituted by an Order in Council, and a church consecrated, and the various offices of the church performed therein, and the incumbent receives the fees to his own use, such district becomes a separate and distinct parish under 19 & 20 Vict. c. 104, s. 14, within the meaning of 6 & 7 Vict. c. 37, s. 15, for the purpose of making separate poor-rates. [He was then stopped by the Court.]

F. Bristowe, Q.C., in reply.

KELLY, C.B. This is a case of some general importance; but we are all of opinion that the judgment of the Court of Queen's Bench must be affirmed.

Under the 59 Geo. 3, c. 134, a district had been created and a church built, and various provisions made and acts done by means of an Order in Council, which, among other things, provides for the publishing and performance of banns of matrimony and solemnization of marriages, churchings, and baptisms, and confers upon the minister of this district church of St. Thomas a right to the fees upon the publication and performance of those several rites of the church. Things continued in that way for a considerable number of years, until the passing of the Act of 19 & 20 Vict. c. 104, which was passed on the 29th of July, 1856; and the first question which arises in this case, important as it is, and involving, un-

(1) 9 Jur. (N.S.) 82.

doubtedly, to some extent, a necessary reference to a great many Acts of Parliament, is whether s. 14 of 19 & 20 Vict. c. 104, commonly called Lord Blandford's Act, applies to the present case. We are all of opinion that it does apply. It provides that "wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms are authorized to be published and performed, in any consecrated church or chapel to which a district shall belong,"—there was a consecrated church or chapel to which this district of St. Thomas belonged,—"such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes,"—and this district was certainly not a separate and distinct parish for ecclesiastical purposes,—"and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereout,"—such was, undoubtedly, the case under this Act of Parliament and this Order in Council with reference to the district church and minister in question,—"such district or place shall become and be a separate and distinct parish for ecclesiastical purposes."

Now the object of the legislature in passing this Act of Parliament, was to effect a provision having a general, I might almost say, a universal operation, and when we find that the language of this section and every portion of it strictly and literally, as well as substantially, applies to this case of St. Thomas' district, I am unable to imagine any ground upon which it can be reasonably contended that it was excepted out of the operation of this clause, or does not come strictly within its terms. If that be so, it became, at the passing of that Act, a separate and distinct parish for all ecclesiastical purposes.

Let us see therefore, as it had become a distinct parish under the operation of this statute, what is the further operation upon this case before us of the provisions in the Burial Acts, or rather, the particular provisions of s. 5 of 20 & 21 Vict. c. 81. I need not go through the other clauses of this Act, nor indeed through the very verbose and diffuse language of the earlier part of the section; but we find, after advancing some way through it, a provision in these terms, under circumstances which are mentioned, and under the Acts of Parliament referred to: "The incumbent of such

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new parish or district,"—well, this became a new parish or district under Lord Blandford's Act which comes within these terms,—"The incumbent of such new parish or district, if any burial ground has been or shall be provided under the herein-recited Acts for the burial of the dead, or any or either of them, for any parish or parishes out of rates to which such new parish, or district, or any part thereof, shall have contributed, or contribute, or be liable,"—that language strictly applies to this case, because here the inhabitants of this district of St. Thomas did contribute to the rates, by means of which the burial ground for the use of the whole parish of Wigan was provided,—"shall with respect to the burial of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed, or contribute as aforesaid as the case may be, perform the same duties and have the same rights, privileges, and authorities, and be entitled to the same fees in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district," subject to the right of the existing incumbent of the mother parish.

Now this provision strictly and literally applies to the present case and is sufficient of itself to entitle the plaintiff to the judgment which he has obtained. I might, if it were necessary, refer further to the objects of the legislature in passing the Act which is commonly called Lord Blandford's Act, but any further reference to that Act of Parliament or to the objects of the legislature, or any argument upon the subject, are altogether superfluous, when we remember that this very question which we are now called upon to decide came before the late most learned and lamented Dr. Lushington in the case of the parish of St. Mary, Shrewsbury: *Gough* v. *Jones* (1) (which case has been brought under our attention by Mr. Manisty), and he held that, under similar circumstances, the provisions in Lord Blandford's Act strictly and directly applied to the new district like the present.

Under these circumstances, it only remains for me to observe that, as to the several cases cited in his learned and able argument by Mr. Bristowe, they were all cases determined upon the particular circumstances which belonged to each, and in none of them was

(1) 9 Jur. (N.S.) 82.

there any direct and clear construction put upon this clause in Lord Blandford's Act, or of the 20 & 21 Vict. c. 81. Those cases, therefore, have no application to the question which we are called upon to decide, and upon these grounds, without going any further into the arguments on the one side or the other, we are all of opinion that the judgment in this case should be affirmed.

MARTIN, PIGOTT, and CLEASBY, BB., KEATING and GROVE, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Bell, Brodrick, & Gray.*
Attorneys for defendants: *Gregory, Rowcliffes, & Rawle.*

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Jan. 29.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 12—*Adoption of the Act*—"*Place having a known or defined boundary.*"

To entitle a district to adopt the Local Government Act, 1858 (21 & 22 Vict. c. 98), as being "a place having a known or defined boundary" within the meaning of s. 12, it is not necessary that it should be a legal district having a legal boundary of the whole inclosed area; it is sufficient if the place has an actual known and defined boundary, or one that is physical, visible, and notorious, so that there may be no mistake as to the limits within which the Act is to apply.

Certain small portions of the township of R. lay within and were surrounded on all sides by the adjoining township of G.:—

Held, that the township of G., together with these small portions of the township of R. inclosed within it, constituted a "place having a known or defined boundary."

RULE obtained on behalf of Mary Grace Taylor calling upon the Local Government Board to shew cause why a writ of certiorari should not issue to remove an order of the Local Government Board, dated the 17th of April, 1872, made under the Public Health Act, 1848 (21 & 22 Vict. c. 98), s. 20, and constituting the district of Grasmere a district under the Act, on the ground that the district was not a "place having a known or defined boundary" within the meaning of s. 12; and that therefore the Act could not be adopted

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therein without its boundaries having first been settled under s. 16. (1)

(1) By 21 & 22 Vict. c. 98, s. 12:—"This Act may be adopted—

"1. In corporate boroughs to which the Public Health Act, 1848, has not been applied, by a resolution of the council assembled at a meeting held for the purpose: . . . .

"2. In other places under the jurisdiction of a board of improvement commissioners, where all or part of the commissioners are elected by ratepayers, or by owners and ratepayers, by a resolution of such improvement commissioners assembled at a meeting held for the purpose:

"3. In all other places having a known or defined boundary, by a resolution of the owners and ratepayers: . . ."

Sect. 13 prescribes the mode of summoning a meeting to be held under s. 12, and the course of proceeding thereat.

By s. 14: "In cases where any place hereby authorized to adopt the Act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same, or unless it has been determined by one of Her Majesty's principal secretaries of state, in manner hereinafter mentioned, that such place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place."

By s. 16: "1. Any place not having a known or defined boundary may petition one of Her Majesty's principal secretaries of state to settle its boundary for the purposes of this Act: . . .

"5. The said secretary of state may . . . make order as to the boundaries of the place . . .

"6. Any place the boundaries of which have been settled in pursuance of the foregoing provisions shall thenceforth, for the purposes of this Act, be deemed to be a place with a known and defined boundary, and may adopt this Act accordingly."

By s. 17: "1. In cases where a resolution adopting this Act has been passed in any place, if any number, being not less than one-twentieth, of the owners and ratepayers of such place, . . . are desirous that the whole or any part of such place shall be excluded from the operation of this Act, they may present a petition to one of Her Majesty's principal secretaries of state appealing against such resolution and praying that such exclusion may be made:

"2. Such petition shall be presented within twenty-one days from the date of the passing of the resolution appealed against . . . .

"3. Upon the receipt of any such petition as aforesaid, the said secretary of state may direct inquiry in the proposed district. . . . .

"5. The said secretary of state shall make order with respect to the matter in question on such appeal, and such order shall be binding on the place in respect of which it is made, and there shall be stated in such order the time at which this Act is to come into force."

By s. 20: "Whenever any resolution adopting this Act has been passed in any place, this Act shall, at the expiration of two months from the date of the passing of such resolution, or in the event of an appeal . . . . then at such time as may be mentioned in the order made on such appeal . . . . have the force of law within such place; and the expiration of such period of two

Nov. 21, 22, 1872. *Sir J. D. Coleridge, A.G.*, and *Lumley*, shewed cause on behalf of the Local Government Board.

Manisty, Q.C., and *W. G. Harrison*, on behalf of the Grasmere Local Board (1).

Lumley Smith supported the rule.

The facts of the case and the arguments sufficiently appear from the judgment of the Court. The following statutes and authorities were cited in addition to those referred to in the judgment: 24 & 25 Vict. c. 61, s. 9; 26 & 27 Vict. c. 17, s. 24; *Ex parte Smith* (2); Lumley's New Sanitary Laws, p. 245, n., 2nd ed.

Cur. adv. vult.

Jan. 29, 1873. The judgment of the Court was delivered by

ARCHIBALD, J. This was a rule obtained at the instance of Mary Grace Taylor, calling on the Local Government Board to shew cause why a writ of certiorari should not issue to remove an order of the Board of the 17th April, 1872, for the adoption of the Local Government Act, 1858, by the district of Grasmere, in the county of Westmoreland, against which cause was shewn on the 21st & 22nd of November last.

It appeared that in the township of Grasmere, in the county of Westmoreland, certain small detached portions of the neighbouring township of Rydal and Loughrigg were comprised, wholly surrounded by portions of the township of Grasmere, and included within the boundary of that township. The detached portions of Rydal and Loughrigg consist of four fields of about eight acres

months, or such date as may be mentioned in the said order as the time for this Act to come into force, shall be called the date of the constitution of the district. . . . ."

By s. 81: "All orders made by one of Her Majesty's principal secretaries of state in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer. . . ."

By 34 & 35 Vict. c. 70, s. 2, all the powers and duties vested in or imposed on a secretary of state under (among other Acts) 21 & 22 Vict. c. 98, are transferred to the Local Government Board.

(1) In the Bail Court, before Quain and Archibald, JJ.

(2) 7 B. & S. 412; 30 L. J. (Q. B.) 305.

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in all, with nine houses in them, and a population of about thirty-seven persons, rated to the township of Rydal and Loughrigg, and of about a rood of shingle and bare stones at the mouth of the river Rothay. The population of the whole of the township of Grasmere and of the detached portions of Rydal and Loughrigg was at the last census less than 3000. It appeared that on the 4th of November, 1871, at a meeting duly convened under s. 13 of the Local Government Act, 1858, of the owners and ratepayers of the township of Grasmere and of the detached portions of Rydal and Loughrigg, as of a place having a known and defined boundary, a resolution was passed adopting the Act, and notice of the resolution was duly given to the Local Government Board. A petition was afterwards presented to the Board under the 17th section of the Local Government Act, 1858, by certain owners and ratepayers of the place appealing against the resolution, and praying that the Board would not approve or sanction the adoption of the Act within any part of the intended district. An inquiry was thereupon held, and in the result an order was made by the Board on the 17th of April, 1872, excluding certain parts (not being the detached portions of Rydal and Loughrigg above referred to) from the intended district, but, subject to such exclusion, defining the boundaries of the district, and directing that from and after the date of the order the Act should come into force within the district. A local board was afterwards, on the 24th of May, elected for the district thus constituted, which proceeded to put in force the provisions of the Act; and it appeared that upwards of 1200*l.* had already been expended, chiefly in providing a supply of water.

An application for a certiorari was originally made at Chambers before Mr. Justice Quain, which was referred by him to the Court, and the date of the first notice of application on motion by the prosecutor was the 24th of September, 1872.

Under these circumstances it was first contended in shewing cause that, inasmuch as the 20th section of the Act provides that any order made on appeal against a resolution adopting the Act shall, after the expiration of two months from its date, have the force of law, the order was conclusive and the application out of time. It was further contended that by virtue of the 81st section of

the Act the order of the board upon the petition against the adoption of the Act was conclusive; and in support of that contention *Ex parte Bird* (1) was cited. It was argued that the remedy, if any part of the proposed district desired exclusion, was under the 14th and 17th sections of the Act; and that as an application had, in fact, been made under the latter section and adjudicated on, the decision of the Local Government Board could not be impugned. But in the course of the argument we intimated our opinion that neither of these contentions could be sustained unless the district in question was at the time of the resolution a place having "a known and defined boundary," which we thought essential, in order to give jurisdiction to make an order under s. 20; and the subsequent argument was addressed to that question.

On this point the contention on behalf of the Local Government Board was, that, notwithstanding the inclusion of the detached portions of Rydal and Loughrigg within the boundary of the township of Grasmere, the entire area was within the meaning of s. 12, subs. 3, a "place having a known or defined boundary," viz., the boundary of the township of Grasmere. On the other hand, it was argued that the boundary of that township could not be regarded for the purposes of this Act as the boundary of the detached portions of the neighbouring township; that a mere physical boundary, including such detached portions, was not sufficient, and that to satisfy the 3rd subsection of s. 12 of the Act the whole of the district within the boundary must be some entire district or division known to the law, such as a hamlet, a township, or parish, and that the mere accidental circumstance that the detached portions of Rydal and Loughrigg were so situated that the township of Grasmere embraced them, was not a sufficient foundation for the application of the Act to the entire area without first taking the proceedings, directed by s. 16 of the Act, to have the boundary settled by the secretary of state as of a place not having a known or defined boundary. We were referred to the cases of *Re Matlock Bath District* (2); *Reg.* v. *Northowram* (3), and *Reg.* v. *Hardy* (4); but these cases have little if any bearing on the precise question before us, which we must endeavour to

(1) 1 E. & E. 931; 28 L. J. (Q. B.) 223.
(2) 2 B. & S. 543; 31 L. J. (Q. B.) 177.
(3) Law Rep. 1 Q. B. 110.
(4) Law Rep. 4 Q. B. 117.

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answer according to what appears to us to be the true construction of the Act.

The Act, unfortunately, furnishes no interpretation of the word "place," or of "place having a known or defined boundary," nor is any such interpretation to be found in the Public Health Act, 1848 (11 & 12 Vict. c. 63); though in some of its sections (see ss. 8, 9), the word "place" is used in connection with "city, town, borough, or parish." In the 18 & 19 Vict. c. 121 (to consolidate and amend the Nuisances Removal and Diseases Prevention Acts), the word "place" is expressed to include "any city, borough, district, parish, township, or hamlet, or part of any such city, borough, district, town, parish, township, or hamlet"; but with this exception, we are not aware of any interpretation of the word in the Acts relating to the public health, and it is to be observed that the definition just referred to is inclusive and not exclusive.

In order therefore to ascertain the meaning of "place," and of the same word with the qualification of a known and defined boundary, we must consider the object and intention of the Act. The object, as expressed in the preamble, is to make provision for the local government of towns and populous districts in England. For this purpose and with a view to promote public health, the Act contains ample provisions for the formation and constitution, under the authority of the secretary of state (now the Local Government Board), of areas or districts convenient in point of locality, size, and limits, for the adoption and application of the Act. The 16th section gives the secretary of state, on petition, the power to settle, for the purpose of the Act, the boundary of any place not having a known or defined boundary, and this power is conferred without being in any way restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships, or parishes. Such divisions would no doubt frequently prove inconvenient for the purpose of sewage and drainage, or the exercise of the other powers of the Act, while the union of several distinct portions of such adjoining divisions into one district might often be the only practicable or useful course. The word "place," therefore, in the 16th section must, we think, be received with the widest possible signification.

It remains, then, to consider what is the meaning of "known

or defined boundary." The Act may (see s. 12) be adopted by resolution: 1. In corporate boroughs to which the Public Health Act has not been applied, by a resolution of the council assembled, at a meeting held for the purpose. 2. In other places under the jurisdiction of improvement commissioners, by a resolution of the commissioners. 3. In all other places having a known or defined boundary, by a resolution of the owners and ratepayers. And then s. 16 points out the course to be adopted with respect to places not having a known or defined boundary. The two first subsections of s. 12 refer to places having a legal status, first a borough, and second, a place under the jurisdiction of commissioners, i. e., commissioners appointed by statute. The 3rd subsection is much more general; and bearing in mind the object of the Act and the provisions of s. 16, the word "place" in this subsection must have at least as extensive a meaning as in s. 16. It may therefore, we conceive, apply to a place consisting of portions of different townships or parishes. In *Smith* v. *Redding* (1) a decision under the Beerhouse Act (3 & 4 Vict. c. 61), s. 15, Blackburn, J., observed, with reference to the meaning of the word "place," that it may well be that if a collection of houses has acquired a distinct name, it may be a place within the meaning of the statute; and Lush, J., says it may be a place of many thousand inhabitants popularly called a town, made up of several parishes or parts of parishes.

What, then, is the nature of the boundary that is necessary to satisfy the description "known or defined?" If "place" is to receive a signification as large as that we have intimated, it cannot be necessary that the boundary should be some legal boundary of the whole enclosed area as of a legal district, for such a boundary would seldom exist in fact, and no such qualification as that of "legal" is attached to the phrase. To attribute to the words "known and defined" their literal meaning seems to us to accord best with convenience and with the objects which the legislature had in view; and we think it therefore sufficient, if there be an actual known and defined boundary, or one which is physical, visible, and notorious, so that there may be no mistake as to the limits within which the Act is to be applied. This we conceive

(1) Law Rep. 1 Q. B. at pp. 492, 493.

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to be on the whole the true meaning of the phrase "a place with a known or defined boundary;" and as the boundary of the township of Grasmere answers to this description, we think the Act was properly adopted and made applicable to the whole area encircled by that boundary, including the detached portions of Rydal and Loughrigg.

Some argument was presented to us grounded on the inconvenience that might arise from the detached portions still remaining part of the neighbouring township of Rydal and Loughrigg; but this inconvenience would equally have existed if the boundary of the district had been settled, including these detached portions, under s. 16, a course which would have been within the power of the Local Government Board if the boundary were not in fact a known and defined one. When exclusion of any portion included within a known and defined boundary is desired there is a ready remedy under the provisions of s. 17, and in fact proceedings were taken under that section in this very case, though it does not appear that exclusion of the detached portions in question was asked for. Again, no difficulty arises in this case upon the provisions of s. 14, the detached portions of Rydal and Loughrigg having no power alone to claim the adoption of the Act.

On the whole, therefore, we are of opinion that the order sanctioning the adoption and directing the application of the Act was valid, and that this rule must be discharged.

Rule discharged with costs.

Attorneys for relator: *Johnson and Wetheralls.*
Attorneys for defendant: *Sharpe, Parker & Co.*

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Jan. 11.

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Alehouse—9 Geo. 4, c. 61—Renewing Licence—Value of Premises—Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 45 and 46.

Sect. 45 of 35 & 36 Vict. c. 94, enacts that premises not licensed at the time of the passing of the Act under the Acts recited in the Wine and Beer House Act, 1869, shall not be subject to any provision now in force prescribing a certain value as a qualification. Sect. 46 enacts that if any premises licensed for the sale of intoxicating liquors at the passing of the Act are not of such annual value as authorizes the grant of a licence, the licence may be renewed upon the condition that the holder improves the premises so as to make them of sufficient annual value:—

Held, that s. 46 did not apply to alehouses already licensed under 9 Geo. 4, c. 61, as they must be taken to have been exempted by s. 45 from the provisions in force as to value.

A LICENCE had been granted, under 9 Geo. 4, c. 61, to John Mann, as a licensed victualler at Exeter, and the house, which was of less value than 30*l.* a year, had been occupied by him under the licence without any complaint for ten years. At the first General Annual Licensing Meeting after the passing of the Licensing Act, 1872, Mann applied for a renewal of his licence. Exeter is a city of more than ten thousand and less than one hundred thousand inhabitants. The justices granted the application subject to a condition imposed under ss. 45 and 46 of the Act (35 & 36 Vict. c. 94). (1) The condition, which was written

(1) By s. 45 of 35 & 36 Vict. c. 94, premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beer-house Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached shall not be subject to any of the provisions now in force, prescribing a certain rent or value or rating as a qualification for receiving any such licence.

Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied:—The premises, unless such premises are a railway refreshment room, shall be of not less value than the following annual value . . . If situated . . . within the limits of a town containing a population of not less than 10,000 inhabitants, 30*l.* per annum.

Sect. 46. Whereas in certain cases a licence under the Wine and Beerhouse Acts, 1869 and 1870, is not to be granted unless the house and premises in respect of which such licence is granted are of such rent or value, or

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on a separate paper and pasted on to the licence below the seals of the justices, was as follows: "Take Notice. This licence is renewed on condition that the licensed premises shall, before the next general annual licensing meeting, be improved and made of the annual value of 30*l.*, in default of which this licence will not then be renewed."

The licence was brought up by certiorari for the purpose of quashing this condition on the ground that it was ultra vires.

The justices did not shew cause against the rule for a certiorari; and the chairman of the licensing meeting filed an affidavit under 35 & 36 Vict. c. 26, stating that the justices would not appear to oppose the quashing of the condition; that they had thought it right to renew Mann's licence as the house had been properly conducted for several years; but that they had considered that they were bound by ss. 45 and 46 of 35 & 36 Vict. c. 94 to renew it only conditionally on the value being increased to 30*l.*

Poland (*Besley* with him), moved to quash the condition, and applied to the Court to hear the motion at once without putting

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are rated to the poor-rate on a rent or annual value of such amount as is respectively in that behalf stated in the Acts recited in the Wine and Beerhouse Act, 1869; and it is expedient to substitute in such cases "annual value" for the said rent, value, or rating, and to provide for the ascertaining the annual value of such house and premises: Be it, therefore, enacted that in cases not provided for by the last preceding section—

A licence under the Wine and Beerhouse Acts, 1869 and 1870, shall not be granted in respect of any premises which are not, in the opinion of the licensing justices who grant such licence of such annual value as is mentioned in that behalf in the Acts recited by the Wine and Beerhouse Act, 1869; and those Acts shall be construed as if "annual value" were therein substituted for "rent," "value," "rated on a rent or annual value," and other like expressions.

If at the first general annual licensing meeting after the passing of this Act the licensing justices are of opinion that any premises which are licensed for the sale of intoxicating liquors at the passing of this Act are not of such annual value as authorizes the grant of a licence for such premises, they may notwithstanding renew such licence upon the condition to be expressed in the licence, that the holder thereof, before the next general annual licensing meeting, improves the premises so as to make them of sufficient annual value, and if the holder fail to comply with such condition the licence shall not be renewed at such next general annual licensing meeting.

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the case in the crown paper, as the justices did not intend to appear; the Court assented to this course.

The question is whether the provision of s. 46 of the Licensing Act, 1872, as to the improvement of the value of the licensed premises applies to an alehouse licensed under 9 Geo. 4, c. 61, at the time of the passing of the Licensing Act. Under 9 Geo. 4, c. 61, licences were granted without restriction as to the value of the house licensed; it was in the absolute discretion of the justices what houses they would license. The persons licensed by the justices then were enabled to get an excise licence. By s. 17 of 9 Geo. 4, c. 61, the excise licence could not be got without a magistrate's licence having been previously obtained. Then, by 11 Geo. 4 & 1 Will. 4, c. 64, persons were permitted to keep houses for the sale of beer only. Under that Act no property qualification was necessary. By 4 & 5 Will. 4, c. 85, s. 2, it was only requisite to obtain a certificate of good character from the inhabitants of the parish, and then the excise granted a licence to sell beer. The 3 & 4 Vict. c. 61, first imposed a property qualification. It required a person who sought to obtain a beer licence to get a certificate from the overseer of the parish that the house in which the beer was to be sold was rated at a certain annual value. By 23 & 24 Vict. c. 27, licences for the sale of wine were allowed to be granted, and by s. 8 certain limits as to "the rent and value" of the house were prescribed. The granting of beer and wine licences was put under the control of magistrates by 32 & 33 Vict. c. 27, s. 4. By s. 8, subs. 4, the duty is imposed upon magistrates of ascertaining whether the person applying for a licence has a house of sufficient value; insufficiency of value being one of the specified grounds on which the certificate can be refused. Those Acts only apply to the granting of beer and wine licences, and have left untouched licences granted to persons keeping inns and alehouses under 9 Geo. 4, c. 61. Sect. 46 of the Licensing Act, 1872, recites the Wine and Beer House Acts, 1869 and 1870 (32 & 33 Vict. c. 27, and 33 & 34 Vict. c. 29), and does not recite 9 Geo. 4, c. 61. It was, therefore, the intention of the legislature by ss. 45 and 46, to remove all doubt as to the value of the houses for which beer and wine licences were required. Rateable value was no real test of annual value. The expression in 23 & 24 Vict.

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c. 27, s. 8, was vague; it might mean gross or net value, and the rateable value of a house might be fraudulently raised for the purpose of obtaining a licence. If the provisions of the former Acts are borne in mind the construction of s. 46 is clear. It substitutes one simple test, "annual value," for the vague expressions "rent," "value," or "rating," and by s. 47 the meaning of annual value is defined. The case of a house licensed under 9 Geo. 4, c. 61, does not come within s. 46. But the legislature thought it a hardship that a person who had a beer or wine licence should lose it because his house was not of the "annual value" required by the Licensing Acts, 1872; it was therefore enacted that the justices might give him a licence conditional upon his improving the premises within one year, so as to make them of sufficient annual value. Then s. 45 does not apply, because this house had been already licensed under 9 Geo. 4, c. 61; that section only applies to houses to be licensed after the passing of the Licensing Act, 1872. The result is that s. 45 applies to new houses of every description licensed for the sale of spirits, wine, and beer, and s. 46 to old houses which are licensed for the sale only of wine and beer.

COCKBURN, C.J. A difficulty arises from the application being that a portion only of the licence be quashed, but in my opinion the supposed condition is not a part of the licence, it is merely annexed to it below the seal; it is therefore a nullity. There is nothing, therefore, that the justices order to be done by virtue of their authority. It is not enough to say they intended to prescribe the condition; and it may be said that the condition not having been sealed, it forms no part of the licence, and therefore is wholly void and inoperative, although the justices might, by incorporating it, have made it part of the licence. But I should not wish to rest our decision on so narrow a ground, being of opinion that in applying the provisions of s. 46 to the present case, the justices have gone beyond the power vested in them. It is very difficult to construe an Act of Parliament so clumsily and inartistically drawn as this is; but I think it is possible to arrive at a satisfactory decision. Licences granted to victualling houses as distinguished from beer and wine houses, appear in s. 15 to be

divided into two classes, namely, one class in which there were licences already in existence prior to the passing of this Act, and the other class in which application is made for a licence for the first time after the passing of the Act, and I think that by s. 45 a distinction is intended to be made between those two classes. The first part of s. 45 must be taken to refer to houses already licensed, but to which, at the time of the passing of the Act, no licence under the Acts referred to in the Wine and Beer House Act, 1869, is attached, and it proceeds to enact that they "shall not be subject to any of the provisions prescribing a certain rent, or value, or rating as a qualification for receiving any such licence." Such houses are excluded from the operation of the subsequent part of the section, which applies to premises not, at the time of the passing of this Act, licensed for the sale of intoxicating liquors. Then, with regard to future applications for new licences, the section provides that the premises shall be of a certain value, depending upon specified circumstances. I think, therefore, that this section is intended to extend only to licences first applied for after the passing of the Act, as distinguished from the renewal of licences previously granted. The legislature probably did not wish to interfere with vested interests: because it would be in some instances a hardship upon a man who has had a licence for many years, without any complaint of his conduct, to be compelled to find other premises, or to increase the value of those he occupies, either of which courses may be beyond his means or beyond physical possibility.

Sect. 46 refers to another class of cases, namely, those in which by the existing statutes certain qualifications are necessary for the sale of wine or beer, and there the legislature gets rid of the former tests of value by the substitution of one general test, namely, that of annual value. Then comes the provision that, supposing premises already licensed should not come up to the qualification required, the magistrates may nevertheless grant a licence, but with such a condition as that which is attempted to be imposed in the present case. This last paragraph of s. 46 is general in its terms; but I think we must consider it as applicable only to the cases within s. 46, and not as applying to cases excluded from

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the operation of ss. 45 and 46, by the enactment with which s. 45 starts.

I think, therefore, that as to victualling-houses which had a licence existing prior to the passing of this Act, the qualification required by the Act does not apply, and that they are excluded from its operation. Consequently, the magistrates could not use the power vested in them by s. 46, and grant a licence subject to such a condition as has been annexed to the licence in this case. I think, therefore, in annexing the condition they have acted ultra vires, and the condition is null and void. There is no necessity for quashing it. The grantee may use the licence, and in the event of his being called upon for the penalty of acting without a licence, it is a sufficient answer that the licence is good on the face of it, but something has been annexed which is illegal and ultra vires. I cannot help thinking it would be wrong to quash a part of the licence without quashing the whole; and I trust, after the expression of our opinion, the magistrates upon the application for the renewal of this licence will not carry into execution their threat not to renew it.

MELLOR, J. I agree with my Lord, that the condition annexed by the justices to the licence is no part of it. It is not sealed, and it is unnecessary to quash it, as it is void and inoperative.

With regard to the other question, I think the construction put upon ss. 45 and 46, is reasonable, and one from which, although I hesitate, I do not dissent. I am apprehensive that by our decision we shall limit the enactment. If all houses heretofore licensed under 9 Geo. 4, c. 61, are to remain in the same condition as to their value as they were previously to the passing of this Act it is to be lamented; as the legislature have shewn by this enactment, that they thought it very desirable to increase the respectability of all houses in which intoxicating liquors are sold. The words of the Act, however, seem to me to justify the construction now put upon them.

LUSH, J. I also think that the magistrates have put a wrong construction on ss. 45, 46. It must be remembered, when the

Act was passed there were three classes of licences—alehouse licences, under 9 Geo. 4, c. 61, beerhouse licences, and wine licences. The wine and the beerhouse licences had recently been classed together under the Acts of 1869 and 1870. The Licensing Act, 1872, is intended to put all the licences on the same footing as regards the means by which they may be obtained. The applicants are all required to have a certificate or licence of magistrates, before they can take out the excise licences; but the Act contains provisions for existing licensed houses, as well as for houses to be newly licensed. Alehouses licensed under 9 Geo. 4, c. 61, such as that of the present applicant, had no licence under the Wine and Beer House Act of 1869; and s. 45 must be taken in substance to say, existing alehouses shall not be subject to any of the provisions now in force prescribing a certain rent, or value, or rating. As I read the first two clauses, they enact:—existing alehouses shall not be subject to the present provisions as to rating; but houses that are not licensed at all shall not be licensed unless they come up to certain conditions. Sect. 46, is confined to licences under the Wine and Beer House Acts, 1869 and 1870, and the Acts therein recited. Probably it has often happened that beerhouses and winehouses had got their qualification on a rating or rent above the true annual value as defined by s. 47; therefore, if the two clauses of s. 46 stood alone, those houses would not be entitled to have their licences renewed; because houses that are not of the annual value fixed in the statute shall not have a licence. That would have disqualified some existing houses, and it became necessary to have the saving clause on which the difficulty has arisen, and which does away with the mischievous effect which would have resulted if the previous clauses had been left unmodified. I read the third paragraph as a proviso on the two preceding. And a further reason for holding that the third paragraph was not intended to apply to alehouses is, that it speaks of such houses as "are not of such annual value as authorizes the grant of a licence;" therefore, it seems only to refer to those licences as to which annual value was a necessary condition. For alehouses under 9 Geo. 4, c, 61, no value was required as a qualification. Reading ss. 45 and 46 together, I think they enact

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that existing alehouses shall not be touched; they shall not require any fresh qualification; new houses shall be of a certain value. So under s. 45, existing wine and beerhouses shall not be touched, except that, if not up to the required annual value, they shall be improved within the twelvemonth.

I quite agree with the rest of the Court, for the reasons given, that it would be contrary to the practice of this Court to quash that which is really no part of the document; but which is utterly valueless.

ARCHIBALD, J. I am also of opinion that the justices came to a wrong conclusion. I agree with my Lord and my Brother Lush that this case is not within the 46th section, and that the justices in attempting to exercise a jurisdiction under that enactment have gone beyond their powers. The matter depends on ss. 45 and 46, which must be taken together, and although they are not clearly worded, yet I think it is possible to ascertain from them with tolerable certainty what was meant.

Unless the first part of s. 45 is to be treated as unmeaning, it must be taken that to some licensed houses the provisions as to the qualification of value and rating are not to apply. The language is very peculiar. At the time of the passing of the Act houses such as the appellant's did not require any qualification of value or rating; the only houses that required it were those that had a licence under the Wine and Beer House Acts of 1869 and 1870 or the Acts recited therein. It is tolerably clear, therefore, that what was meant was that houses already licensed, but not having a licence under the Acts recited in the Wine and Beer House Acts of 1869 and 1870, were not to be subject to the provisions as to rating and qualification in force at the time of the passing of this Act. And then, if we look at s. 46, I think the language of the last paragraph will shew that such houses as this would be excluded, as no qualification was necessary at the passing of the Act to authorize the renewal of a licence to them. Sect. 45 leaves the premises that were licensed under 9 Geo. 4, c. 61, at the time of the passing of the Act wholly untouched; and the discretion vested in the justices under s. 1 of that Act

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still exists. That being so, Mr. Poland's contention seems sound, that the provisions of s. 46 cannot apply, because it refers only to wine and beerhouses having licences under the Acts of 1869 and 1870, and for which, according to those Acts, a certain rent or annual value was requisite.

Then, as regards the general intention of the Act, the preamble certainly shews it was intended to restrain the vice of intemperance; but that is done by the legislature with some regard to vested interests, and it may have been the intention of the legislature to make a distinction between those cases in which a rating value or an annual value was requisite before a licence was granted, and those cases in which no rating or annual value was required There may not be the same hardship in increasing a qualification already existing, as there might be in imposing the qualification on houses where it did not previously exist; therefore, if we can see that the legislature intended to protect vested interests, we are bound to put a construction upon the statute that will carry out that intention.

I quite agree upon the other point. This is not a case in which we should make an order to quash the condition in the licence; and this expression of opinion will probably be sufficient.

Rule, that a procedendo issue to carry back the licence to the justices.

Attorneys for applicant: *H. J. & T. Child.*

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SWIFT *v.* WINTERBOTHAM, P. O., AND GODDARD.

False Representation—Signature of Party to be charged—9 Geo. 4, c. 14, s. 6—Signature by Agent of Company formed under 7 Geo. 4, c. 46—Principal and Agent—Action against Joint Tortfeasors.

5 PC 404,
4 Ch D 699
5 Ch D 480
5 App Ca 319
6 QBD 705

The plaintiff sued W. & G. jointly, for a false representation with respect to the solvency of R. The defendant W., was sued as the public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant, G., was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R. was responsible to the extent of 50,000*l*. The defendant, G., wrote a letter, which he signed as manager, giving a favourable reply as to R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—

Held, first, that the signature of G. as manager was the signature not merely of an agent, but of the defendants' banking company itself, and therefore the signature of the party to be charged within s. 6 of 9 Geo. 4, c. 14, s. 6, so as to make the banking company liable for his false representation.

Secondly, that the letters shewed that the communications were between the two banks; and the representation was not merely the representation of G. personally, but of the defendants' banking company.

Thirdly, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R.'s solvency might have been made on behalf of a customer of the S. bank, and that the representation might be communicated to him; and that the banking company and G. were liable to the plaintiff, he being the customer who had made the inquiry.

Fourthly, that, on the authority of *Barwick* v. *English Joint Stock Bank* (Law Rep., 2 Ex. 259), the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank.

Lastly, that, as all persons directly concerned in the commission of a fraud are to be treated as principals, the banking company and G. might be sued jointly.

Cited as to Goddard but not as to Bank 16 QBD

THIS was an action against the defendant Winterbotham, as registered public officer of the Gloucestershire Banking Company, and the defendant Goddard, for a false and fraudulent representation that Sir William Russell was in good and solvent circumstances.

The defendants pleaded separately not guilty.

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At the trial, before Cockburn, C.J., at the sittings in London after Hilary Term, 1872, a verdict was found for the plaintiff for 2,937*l.*, leave being reserved to move to enter a verdict for the nonsuit.

A rule was afterwards obtained on behalf of the defendant Winterbotham on the ground that there was no writing signed by the bank; that the defendant Goddard was not the agent of the bank to sign; that the bank were not liable for a false representation by the defendant Goddard; that there was no representation by the bank to the plaintiff; and that there was no representation by the bank, or false statement by them; and also for a new trial, on the ground that the verdict was against the weight of evidence.

A rule was also obtained on behalf of the defendant Goddard on the ground that the verdict was against the weight of evidence, and on the ground of misdirection in the Lord Chief Justice in not telling the jury that the defendant Goddard had not made himself liable, the representation of November the 9th, 1869, not being signed by him in his personal capacity, and no misrepresentation being signed by him within Lord Tenterden's Act (1), or why a verdict should not be entered for the defendant, Goddard, on the ground that the alleged misrepresentation was not made to the plaintiff, and that the Sheffield and Hallamshire Bank were not the agents of the plaintiff to make the inquiry contained in the letter of the 8th of November, 1869.

The facts of the case and the arguments sufficiently appear in the judgment of the Court.

June 5, 1872. *Day, Q.C.*, and *Edward Clarke*, shewed cause against both rules.

June 6. *H. James, Q.C.*, *Risdon Bennett*, and *Jeune*, in support of the rule obtained by Goddard.

(1) 9 Geo. 4 c. 14, s. 6: "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon, [sic] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

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June 7. *Sir John Karslake, Q.C., Sir George Honyman, Q.C.,* and *Austie,* in support of the rule obtained by Winterbotham.

The following cases, in addition to those mentioned in the judgment, were cited: on the point that the action was founded on a representation which, under 9 Geo. 4, c. 14, s. 6, must be made in writing, and "signed by the party to be charged therewith:" *Scott* v. *Eastern Counties Ry. Co.* (1); *Kingsford* v. *Great Western Ry. Co.* (2); *Jessel* v. *Bath* (3); *Richardson* v. *Younge* (4); on the point that the representation was not that of the banking company, but of Goddard personally, and that the plaintiff could not therefore sue the banking company: *Western Bank of Scotland* v. *Addie* (5); *National Exchange Company* v. *Drew* (6); *Ranger* v. *Great Western Ry. Co.* (7); *D'Arcy* v. *Tamar, Kit Hill, & Callington Ry. Co.* (8); *Barry* v. *Croskey* (9); *Pilmore* v. *Hood* (10); *Pasley* v. *Freeman* (11); *Blakemore* v. *Bristol & Exeter Ry. Co.* (12)

Cur. adv. vult.

Feb. 17. The judgment of the Court (Cockburn, C.J., and Quain, J.) was delivered by

QUAIN, J. This is an action brought by the plaintiff against the defendant Winterbotham as the public officer of the Gloucestershire Banking Company, and against the defendant Goddard, who was the manager for the Company at the branch bank at Cheltenham, for a false representation.

The declaration charged the defendants with making a joint false representation with respect to the credit and solvency of one Sir W. Russell, whereby the plaintiff was induced to sell to Russell certain goods for which the plaintiff has not been paid in consequence of Russell's insolvency.

The defendants severed in their pleadings, and some grounds of defence were set up on the part of the bank which were not applicable to the other defendant.

(1) 12 M. & W. 33.
(2) 16 C. B. (N.S.) 761; 33 L. J. (C. P.) 307.
(3) Law Rep. 2 Ex. 267.
(4) Law Rep. 6 Ch. 478.
(5) Law Rep. 1 H. L. Sc. 145.
(6) 2 Macq. 103.
(7) 5 H. L. C. 72.
(8) Law Rep. 2 Ex. 158.
(9) 2 J. & H. 1.
(10) 5 Barn. N. C. 97.
(11) 3 T. R. 51; 2 Sm. L. C. 71, 6th Edit.
(12) 8 E. & B. 1035; 27 L. J. (Q.B.) 167.

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The facts were these. The plaintiff, having been asked by an agent of Sir W. Russell to sell some iron, of the value of between 2000*l.* and 3000*l.* to Russell, requested a reference as to his credit, and was referred to the Cheltenham Branch Bank of the Gloucestershire Banking Company.

The plaintiff being a customer of the Sheffield and Hallamshire Bank at Sheffield, requested the manager of that bank to make the inquiry for him, and in consequence of that request, the manager of the latter bank wrote to the Manager of the Gloucestershire Banking Company at Cheltenham a letter dated the 8th of November, 1869, of which the following is a copy:—

"Sheffield and Hallamshire Bank,
"Sheffield, Nov. 8, 1869.

"Sir,—I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of Sir W. Russell, Bart., M.P. for Norwich, and whether you consider him responsible to the extent of 50,000*l.*

"I am yours faithfully,
"H. J. Wells,
"Sub-Manager.

"The Manager Gloucestershire Banking Company Cheltenham."

To that letter the defendant Goddard replied by a letter dated the 9th of November, 1869, which is as follows:—

"Gloucestershire Banking Company,
"Cheltenham, 9th Nov., 1869.

"The Sheffield and Hallamshire Bank, Sheffield.

"Gentlemen,—I am in receipt of your favour of the 8th instant, and beg to say in reply, that Sir W. Russell, Bart., M.P. for Norwich, is the Lord of the Manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7000*l.* per annum, the receipt of which is in his own hands, and has large expectancies; and I do not believe he would incur the liability you name unless he was certain to meet the engagement.

"I am, gentlemen, yours faithfully,
"J. B. Goddard,
"Manager."

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It was upon the representation contained in this letter of the 9th of November, 1869, that the present action was founded.

At the trial, before the Lord Chief Justice, at the sittings after Hilary Term, 1872, it was found by the jury that the representation contained in this letter was false to the knowledge of the defendant Goddard.

The banking company had, however, no knowledge (otherwise than through its manager Goddard) that such a letter had been written, and gave him no express authority to write the letter.

The jury further found as a fact, on the question being left to them, that the writing of such a letter as that of the 9th of November, was an act done within the scope of the general authority conferred on Goddard as Manager of the branch bank. On these findings the verdict was entered for the plaintiff against both defendants for 2937*l.*

Both defendants moved to set aside this verdict on the ground that it was against the weight of the evidence; but, after considering the oral evidence adduced at the trial, and reading all the correspondence which passed between Sir W. Russell and the defendants respectively, we are not disposed to disturb the verdict on any of the questions of fact left to the jury.

But several questions of law were raised on behalf of the defendants respectively, and were argued before us, which it now becomes necessary to dispose of.

It was first objected, on the part of the banking company, that the action being founded on a representation, which under 9 Geo. 4, c. 14, s. 6, must be made in writing and signed "by the party to be charged therewith," the signature of Goddard, who it was contended was at best only an agent of the company, would not suffice to charge the company.

For this contention the case of *Hyde* v. *Johnson* (1) was chiefly relied on. That was a case decided on the 1st section of the same Act, which enacts that no promise or acknowledgment shall suffice to take a debt out of the statute of limitations unless it is contained in some writing "signed by the party chargeable thereby;" and it was held, that under that enactment the signature of an agent would not suffice, although in that case the agent was

(1) 3 Scott, 289; 2 Bing. N. C. 776.

duly authorized to sign the acknowledgment, and it appeared that the defendant could not write. In the judgment of the Court the Chief Justice refers to the various sections of 9 Geo. 4, and also to the sections of the statute of frauds as in pari materiâ. The conclusion at which the Court arrives is, that whenever the legislature intended that the party to be charged should be bound by the signature of his agent, there was an express enactment to that effect, and that in other cases the signature must be the signature of the actual party to be charged. This case was confirmed by the same Court in *Clark* v. *Alexander* (1), and in another case, that of *Toms* v. *Cuming* (2). In the latter case, an Act of Parliament requiring that "every notice of objection shall be signed by the person objecting," the law as laid down in *Hyde* v. *Johnson* (3) was again acted on; and it was held that the signature by the agent of the "person objecting" was not sufficient. Since these cases were decided the Legislature has enacted by the 13th section of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), that the signature of a duly authorized agent shall be sufficient under the 1st section of 9 Geo. 4, c. 14; but the law as expounded in *Hyde* v. *Johnson* (3) still remains applicable to the 6th section of the Act.

We consider ourselves bound by these decisions to hold—there being no substantial difference between the language, as to the signature, used in s. 1 and in s. 6—that, in an ordinary case of principal and agent, a written representation within s. 6 of 9 Geo. 4, c. 14, signed by the agent alone would not be binding on the principal, although such signature was duly authorized by him.

But it is contended, on the part of the plaintiff, that this law is not applicable to the present case, on the ground that the banking company "the party to be charged" can sign in no other way than by its agent or Manager, and therefore that either the signature of Goddard is in fact and law the signature of the banking company within the 6th section of 9 Geo. 4, c. 14, or that where the principal is a body that cannot sign in any other way than by agent, the signature of the agent—the only signature possible in the circumstances—is sufficient.

(1) 8 Scott's N. R. 147. (2) 8 Scott's N. R. 910; 7 M. & G. 88.
(3) 3 Scott, 289; 7 Bing. N. C. 776.

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In order to decide the question it becomes necessary to investigate the constitution of the banking company. It appears that the Gloucestershire Banking Company is a co-partnership formed under 7 Geo. 4, c. 46, for the purpose of carrying on the business of bankers at places more than sixty-five miles from London. The company is not a corporation, and has, therefore, no common seal. It is a co-partnership created by deed or articles of co-partnership for a particular purpose, with certain statutable privileges. It can sue and be sued only in the name of one of its public officers, and in all litigious business the company is represented by one of its public officers who must be a member of the company; and individual members cannot be sued in respect of transactions with the company till a judgment or decree has been first obtained against the company through one of its public officers. In *Powles* v. *Page* (1) a company established under this Act was considered a quasi corporate body so as not to be affected by what may have been known to any individual member.

The Act contains no provision as to the manner in which the company shall make or sign deeds, contracts, or documents of any description. It confers no authority on the public officer to bind the company, but makes him the representative of the bank only for litigious purposes; and although he must be a member of the company, he may have nothing to do with the management of its affairs. It seems obvious, therefore, from the nature of its constitution as a fluctuating and numerous body, that the company cannot affix its signature to documents otherwise than by the hand of some individual or individuals who, by the articles of co-partnership, are appointed to represent the general body in such matters.

Now in the present case the deed of co-partnership has not been produced, and all that we have to inform or guide us as to the mode in which the company signs a contract or written representation like the present letter is the finding of the jury, founded on the evidence as to the practice of joint-stock banking companies given on the trial, that it was within the authority of Goddard as Manager of a joint-stock banking company to answer inquiries made by another joint-stock company respecting the responsibility

(1) 3 C. B. 16.

of a particular person, and consequently that for the present purpose the signature of Goddard to the letter of the 9th of November must be taken to have been that of the company itself; and as the deed of co-partnership was not produced, we may fairly infer that if produced it would have confirmed the finding of the jury. No other mode of signing by the bank has been proved before us.

Under these circumstances, we are of opinion that the signature of Goddard in this case, signing, as he does, as Manager for the banking company, is in fact the signature, not merely of an agent, but of the banking company itself, and, therefore, the signature of the "party to be charged" within the 6th section of 9 Geo. 4, c. 14. We may add that this question cannot now arise with respect to banking co-partnerships or other joint-stock companies formed under the Joint Stock Companies Act, 1862, so far at least as the signing of contracts is concerned, for the 37th section of 30 & 31 Vict. c. 131 enacts that "any contract which, if made between private parties, would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company."

It was further objected on behalf of the banking company that the representation was not the representation of the bank, but of Goddard personally. We think there is no foundation for this objection. The inquiry was made by the Sheffield Bank and is signed by its Sub-Manager, and is addressed to the Manager of the Gloucestershire Banking Company, and the reply is signed by Goddard, as Manager of that bank. We think it clear, therefore, that the communications were in fact, and were intended to be, communications between the banks.

The next point relied on on behalf of both defendants was that the representation on which the action is founded was made, not to the plaintiff, but to the Sheffield and Hallamshire Bank, and that the plaintiff, therefore, cannot sue upon it; that the plaintiff at all events never authorized any inquiry as to whether Sir W. Russell was responsible to the extent of 50,000*l*.

We think that the facts as proved, and as they must be considered to have been found by the jury, dispose of this objection.

The plaintiff was a customer of the Sheffield Bank, and it was

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clearly established by the evidence that it was he who put the Sheffield Bank in motion to make the inquiry, and that the inquiry was in fact made on his behalf and for his benefit. It is true that he was proposing to trust Sir W. Russell only to the extent of between 2000*l.* and 3000*l.*; and that it would have been sufficient for his purpose if the bank had inquired in respect of the responsibility of Sir W. Russell to that extent. But the plaintiff did not prescribe to his bankers how or in what manner they were to make the inquiry. He did not say to them "Inquire if Sir. W. Russell is responsible to the extent of 2000*l.* or 3000*l.*," but he went to his bankers in the usual manner, and asked them to inquire generally as to the responsibility and standing of Sir W. Russell; and they made the inquiry in the form of the letter of November 8th, asking if he was responsible to the extent of 50,000*l.* On these facts we think that the inquiry was made on behalf of the plaintiff, and that it is of no consequence that the Sheffield Bank, without any express order from the plaintiff, put the inquiry in the form of asking if Sir W. Russell was a responsible person for 50,000*l.* Nor are the defendants at all prejudiced by the form of the inquiry; for, of course, if Sir W. Russell was represented to be a responsible person for 50,000*l.*, the plaintiff was entitled to infer that his credit must be good to the extent of 2000*l.* or 3000*l.* It was further proved in evidence that the usual way for customers of a bank to make inquiries of this description is through the bank, bankers uniformly refusing to answer inquiries made by private persons, strangers to the bank from which the information is sought, and only answering those made by other bankers; while it is notorious amongst bankers that such inquiries are constantly made on behalf of customers. We think, therefore, that it must be intended that the answers to such inquiries would be sent not merely for the use or benefit of the bank making the inquiry, but for the use and benefit of the customer on whose behalf the inquiry is made, and we think it must be taken in this case that the jury have so found.

These facts we think bring the present case within the law as laid down in *Langridge* v. *Levy* (1), as it must be considered that it was within the contemplation of the defendants when the representation was made that it would or might be communicated to

(1) 2 M. & W. 519.

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the customer of the bank on whose behalf the information was sought; where that is so, and the person to whom the false representation is thus communicated acts on it and suffers damage thereby, he is entitled to maintain an action for such damage in the same manner as if the representation had been made directly to himself.

It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby. We think that the law on this subject is correctly stated by Pollock, C.B. in *Bedford* v. *Bagshaw* (1) as follows: "Generally a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or, at all events to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or at all events that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing."

In the present case it has been proved to be the usage amongst bankers to make inquiries of this kind on behalf of their customers, and we think, therefore, that when Goddard wrote the letter of the 9th of November, he must necessarily be considered to have known and contemplated that it would or might be communicated to the customer of the Sheffield Bank (if any) on whose behalf the information was sought; and we are, therefore, of opinion that under these circumstances the customer (though not individually known to Goddard)—the representation having been communicated to and acted upon by him, and he having been injured thereby—may sue upon it.

(1) 29 L. J. (Ex.) at p. 65.

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It must, however, be understood that our judgment is confined to the case before us, namely, the case of the customer at whose request the inquiry was actually made, and that it is not intended to apply to any other customer to whom the bank may have subsequently communicated the contents of the letter.

For these reasons we think that the plaintiff is entitled to maintain an action on this representation.

Lastly, it is contended on behalf of the defendants, that the signature of Goddard to the letter of the 9th of November is not sufficient to enable the plaintiff to bring an action against both defendants, as on a joint false representation, on the ground that if it binds Goddard personally, then it does not bind the bank jointly with him; or that if it binds the bank, then Goddard is not liable jointly with the bank. It was further objected on the part of the bank that the company as a principal was not liable for the fraud of its agent Goddard, unless it authorized the commission of the fraud, or ratified it.

As to this last point, assuming the case to be one in which a principal is sought to be made liable for the fraud of his agent, we consider that the case of *Barwick* v. *The English Joint Stock Bank* (1) is conclusive to shew that the banking company is liable for the fraudulent representation of its Manager made in the course of conducting the business of the company.

As regards the objection that the defendants cannot be sued together as for a joint representation, it must be remembered that this is an action of tort, and in such actions all persons liable for the commission of the tort, whether principals, agents, or servants, are liable to be sued jointly. In *Cullen* v. *Thompsons' Trustees and Others* (2), Lord Westbury says, "All persons directly concerned in the commission of a fraud are to be treated as principals, no party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another." Besides, in the present case, we hold that the letter of the 9th of November is signed by the bank as well as by Goddard personally, and that as the verdict establishes that the representation was false to the knowledge of Goddard, his knowledge is imputable to the bank; and therefore both are liable to be sued jointly.

(1) Law Rep. 2 Ex. 259. (2) 4 Macq. 424.

For these reasons we are of opinion that both rules must be discharged, and that the plaintiff is entitled to our judgment.

Rules discharged.

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Attorneys for plaintiff: *Harper & Co.*

Attorneys for defendants: *Waterhouse & Winterbotham.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 1.

Libel and Slander—Privileged Communication—Proceedings of Court of Inquiry instituted by Commander-in-Chief under Articles of War—Evidence.

A court of inquiry, instituted by the commander-in-chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognized in the Articles of War and the Mutiny Acts; and statements, whether oral or written, made by an officer summoned to attend before such court to give evidence, are absolutely privileged, even though they be made malâ fide, and with actual malice, and without reasonable and probable cause.

Such statements are part of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and on grounds of public policy cannot be produced in evidence.

Affirmed by H.L. 7 H.L. 744

BILL of exceptions to the ruling of Blackburn, J., in an action for libel tried in the Court of Queen's Bench at Westminster, on the 4th of February, 1871.

The declaration contained two counts. The first for writing and publishing of the plaintiff as follows: "On every occasion that I have seen him in the presence of his commanding officers his manner has betrayed a total want of deference, not to use a stronger term, and all reports have represented him as habitually insubordinate;" and also, "I certainly told him that unless he gained more self-command and behaved with more respect to those under whose orders he served, I must consider him unfit for command, as I did for his present position. I am still of that opinion, and I cannot think that I overstepped my duty in expressing it clearly to him;" and also, he (the adjutant-general) then asked

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whether I wished the lieutenant-colonel (the plaintiff) to be tried for insubordination. I answered, I had only placed him under arrest because I could not permit an officer to treat me with marked disrespect in the presence of a great many junior officers, but that I scarcely believed him to be responsible for his actions. I should prefer his being admonished and released, and also I told the former court that which I again repeat, viz., that, after a long and earnest consideration of all that has passed, I reported to his Royal Highness my conviction that the lieutenant-colonel was unfit to command."

The second count was for speaking and publishing of the plaintiff words nearly identical with those contained in the first count.

Plea, not guilty, and issue thereon.

At the trial to prove the above issue, it was stated to the jury by counsel for the plaintiff, and admitted by counsel for the defendant, as follows:—

1. That at the time of the writing and publishing of the words set forth in the first and second counts respectively, that is to say, of the 14th of February, 1865, the plaintiff was an officer in her Majesty's army holding the commission of captain and lieutenant-colonel in the first battalion of the Coldstream regiment of foot guards, and the defendant was an officer in the army holding the commission of lieutenant-general.

2. That on the 25th of May, 1860, the defendant had been and was an officer in the army holding her Majesty's commission as lieutenant-general, and in command of a brigade of the army including the regiment of foot guards, and the defendant continued to be the commanding officer of such brigade up to and until the 2nd of July, 1860.

3. That plaintiff on the 25th of May, and up to and until the 2nd of July inclusive, held her Majesty's commission of captain and lieutenant-colonel in the regiment of foot guards, and was, during all that period of time, under the command of and subject to the orders of the defendant as his commanding officer.

4. That during that time certain regulations and orders made by her Majesty relating to the discipline and government of the army, and known as "The Queen's Regulations and Orders for the Army," were and still are in force, among others a regulation as

7 H.L. 745

7 H.L. 748

follows: "A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report upon any matters that may be brought before it, but it has no power (except when convened to record the illegal absence of soldiers as provided for in the Articles of War) to administer an oath nor to compel the attendance of witnesses not military." And a further regulation as follows: "A court of inquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the convening officer to collect and record information only, or it may be required to give an opinion also on any proposed question or as to the origin or cause of certain existing facts or circumstances; specific instructions on these points are, however, always to be given to the court. The proceedings are to be recorded in writing as far as practicable in the form prescribed for courts-martial, signed by each member, and forwarded to the convening authority by the president."

5. That on the 3rd of February, 1865, it was directed by Field Marshal His Royal Highness George, Duke of Cambridge, Commanding-in-Chief, that a court of inquiry should be held for the purpose of making such inquiries and affording such information as hereinafter mentioned and referred to.

6. That a letter summoning such court of inquiry was, on the 4th of February, 1865, by command of the commander-in-chief, sent by the adjutant-general to Lord F. Paulet, the fit and proper person to be charged with the duty set forth in the letter. The letter required Lord F. Paulet to cause certain officers therein named to be detailed as members of a court of inquiry under the presidency of Sir Alexander Woodford.

7. That, on the 4th of February, 1865, a letter, by command of the commander-in-chief, was sent by the adjutant-general to Sir Alexander Woodford, informing him he was appointed president of a court of inquiry, and continued: "The subject which will be submitted for your investigation arises out of an assertion, frequently repeated and insisted on, by Lieut.-Colonel Dawkins, that certain officers under whose command at various times he has been placed have made false statements of facts to his injury. Repu-

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diating the interpretation which the commander-in-chief was willing to place on these words, viz., 'that Lieut.-Colonel Dawkins alluded to opinions and conclusions on the part of those officers with which, being unfavourable to himself, he did not coincide,' this officer has insisted on giving the more offensive interpretation to his words, as will be seen by the correspondence submitted to the court. Under these circumstances it has become necessary, in justice to the officers who, in exercise of their command, have from time to time found fault with Lieut.-Colonel Dawkins, to ascertain whether Lieut.-Colonel Dawkins can substantiate his charges against them. The court, therefore, under your direction, will give, after due investigation, their opinion as to the validity of the charges in the sense in which Lieut.-Colonel Dawkins presses them against his superior officers, and also will give their opinion upon Lieut.-Colonel Dawkins' conduct generally, as evinced by the correspondence submitted, and state how far they consider the service will be benefited, or the contrary, by placing Lieut.-Colonel Dawkins in command of a battalion of Guards when the occasion presents itself."

8. That the court of inquiry met on the 10th of February, 1865, and proceeded to investigate the several matters submitted to them on that and several subsequent days.

9. That the plaintiff, as such officer, appeared before such court at such sittings, and made statements and produced and read documents in reference to the charges and to the matters so referred and submitted to the court of inquiry.

10. That the defendant as such officer was required to, and on the 14th day of February, 1865, did appear before the court of inquiry to be examined before the court touching the matters so referred and submitted to the court, and was examined by the plaintiff and by the court respectively touching the matters so referred and submitted.

11. That on the 14th of February the defendant, amongst other statements made by him in the course of his examination before the court, made to the court the several statements set forth in the second count of the declaration. And afterwards, and after the close of his examination before the court, and without any request by the court, or by the plaintiff, or by any other person to him so

to do, handed in to the said court a written paper containing the words set forth in the first count, which was received by the court.

12. That the plaintiff applied to the proper military authority in that behalf for a court-martial on the defendant for such his conduct towards the plaintiff; and such military authority having power to grant or refuse the court-martial, did refuse to summon or allow the same to be held, whereupon the plaintiff brought the present action.

13. The aforesaid statements and admissions having been made upon the trial of this cause, thereupon the counsel for the plaintiff proposed and offered further to give in evidence and prove that the defendant, in making and handing in the said statements, set forth in the first and second counts respectively, was acting malâ fide and with actual malice, and that the statements were respectively made without any reasonable or probable cause for the same, and with a knowledge on the part of the defendant that they were respectively false.

14. Whereupon the counsel for the defendant interposed, and insisted that even if the evidence proposed and offered to be given by the plaintiff were given, and it was proved that the defendant in making the statements was acting malâ fide and with actual malice, and that the said statements respectively were made without any reasonable or probable cause and with a knowledge on the part of the defendant that they were respectively false, still the action would not lie.

15. And the judge declared his opinion that the evidence so offered to be given by the plaintiff was immaterial and irrelevant; and that, as a matter of law, the action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry in relation to the conduct of the plaintiff being a military man, and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted malâ fide and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements so made and handed in by him were false; and the judge then directed the jury, that under the circumstances so stated and admitted as above set forth,

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as a matter of law the action would not lie, even though the plaintiff should prove that the defendant had acted malâ fide, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him were false. And the jurors, by the direction of the judge, then gave their verdict for the defendant upon the issue.

Feb. 13, 1872. *H. Matthews, Q.C.* (*Holl*, with him), for the plaintiff, contended, that primâ facie an action lies for libel or slander unless it be privileged; in the present case, there being malice, the statements were not privileged. The cases shew that an action will lie for acts done in excess of authority by one military man to another: *Grant* v. *Shard* (1); *Frye* v. *Ogle* (2); *Moore* v. *Bastard* (3); *Reynolds* v. *Kennedy* (4); *Wall* v. *M'Namara* (5); *Swinton* v. *Molloy* (6); *Warden* v. *Bailey*. (7) The modern doctrine that such an action does not lie is founded on *Johnstone* v. *Sutton* (8); but the reasoning of Lord Mansfield in that case is dissented from by Cockburn, C.J., in *Dawkins* v. *Lord F. Paulet*. (9) *Home* v. *Bentinck* (10) only decided that a report of a court of inquiry is a state paper—that decision therefore does not apply. In *Dickson* v. *Lord Wilton* (11), and in *Dickson* v. *Lord Combermere* (12), the question of malice was left to the jury. In *Dawkins* v. *Lord Rokeby* (13) there was no evidence that the defendant acted maliciously, and the opinion of Willes, J., though entitled to weight, was unnecessary. Upon the principle of those cases an action lies for defamatory statements if the defendant acted malâ fide and with actual malice. No action will lie against a witness for uttering defamatory statements in the course of a judicial proceeding, even though he do so maliciously: *Revis* v.

(1) Cited in the argument in *Warden* v. *Bailey*, 4 Taunt. at p. 85.

(2) Cited by Lawrence, J., in *Warden* v. *Bailey*, 4 Taunt. at p. 87.

(3) Cited by Mansfield, C.J., in *Warden* v. *Bailey*, 4 Taunt. at p. 70, and reported in 2 Macarthur on Courts-Martial, 4th ed. 195.

(4) 1 Wils. 232.

(5) Cited in *Johnstone* v. *Sutton*, 1 T. R. at p. 536.

(6) Cited in *Johnstone* v. *Sutton*, 1 T. R. at p. 537.

(7) 4 Taunt. 67; in error, 4 M. & S. 400.

(8) 1 T. R. 510; 1 Brown, P. C. 76.

(9) Law Rep. 5 Q. B. at p. 108.

(10) 2 B. & B. 130.

(11) 1 F. & F. 419.

(12) 3 F. & F. 527.

(13) 4 F. & F. 806.

Smith (1); *Floyd* v. *Barker* (2); *Dampert* v. *Sympson* (3); nor against a barrister, *Hodgson* v. *Scarlett*. (4) But a court of inquiry is not a judicial proceeding; it is not to be considered in any light as a judicial body, it may be employed at the discretion of the convening officer to collect information or to give an opinion: Simmonds on Courts-martial, chap. 9. It is like a committee of a club inquiring into the misconduct of a servant, or the Benchers of the Inns of Court into the professional conduct of one of its members. In order to ascertain whether a court of inquiry is a judicial body, it is necessary to examine its constitution and the functions it has to discharge; it has none of the incidents of a judicial body; it has no power to administer an oath, and no indictment for perjury can be preferred against a witness; witnesses therefore who attend before it to give evidence are not absolutely privileged, but only privileged sub modo, that is, that their statements are not privileged if they are false to the knowledge of the persons making them. Even if the oral statements of a witness before a court of inquiry are privileged, the privilege does not extend to a written statement handed in by a witness where such statement is false to his knowledge, and made maliciously and without reasonable and probable cause.

Feb. 14, 1872. *Sir J. B. Karslake, Q.C.* (*Archibald* and *Fitzmaurice* with him), for the defendant, contended that the statements of a witness, who is a military man, and is required to attend before a court of inquiry, directed to be held by the Commander-in-Chief, into the conduct of another military man, are absolutely privileged, even though such statements are made maliciously and without reasonable and probable cause. And although a court of inquiry is not a court of record, yet, as the witness was not a volunteer, but was compelled to attend and give evidence, the statements made by him were protected on the ground of public policy, and no action would lie against him. If oral statements were privileged, then a written statement handed in during the course of the inquiry was equally privileged, as there was no valid distinction between them. He cited *Fray*

(1) 18 C. B. 126; 25 L. J. (C.P.) 195.
(2) 12 Co. Rep. 23.
(3) Cro. Eliz. 520.
(4) 1 B. & Ald. 232.

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v. *Blackburn* (1); *Scott* v. *Stansfield* (2); *Revis* v. *Smith* (3); *Henderson* v. *Broomhead* (4); *Dawkins* v. *Lord F. Paulet* (5.)

Matthews, Q.C., was heard in reply.

Cur. adv. vult.

Feb. 1. The judgment of the Court (Kelly, C.B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB.; Byles, Keating, Brett, and Grove, JJ.), was delivered by

KELLY, C.B. The plaintiff in this case, a colonel in the army, having been reported to have exhibited on several occasions a want of deference to some of his superior officers, and to have been guilty of other unofficerlike conduct, and also to have made certain charges against several of his brother officers; His Royal Highness the Commander-in-Chief was pleased to direct that a court of inquiry should be assembled, and that the matters should be inquired into and reported upon to him. A court of inquiry was held, and the defendant Lord Rokeby, also an officer of rank in the army, was required to attend, and did accordingly attend, as a witness before this Court. Being examined as a witness, he gave certain vivâ voce evidence; and, when the examination was closed, handed in to the Court a written paper, containing in substance a repetition of the evidence which he had given by word of mouth, with some additions upon the same subject; and this paper was received by the Court, and it must be presumed formed part of the minutes of the proceedings. A report was duly made to the Commander-in-Chief, and certain consequences followed, but which do not appear in evidence on this record. It is, however, stated that the plaintiff applied to the proper military authority for a Court-martial on the defendant, and that such military authority, having power to grant or to refuse the said Court-martial, did refuse to summon or allow the same to be held. Thereupon the plaintiff brought the present action, in which, in the first count, he charges the written paper above referred to as a libel; and, in the second count, the vivâ voce evidence as verbal slander.

The above facts appear to have been admitted at the trial; and

(1) 3 B. & S. 576.
(2) Law Rep. 3 Ex. 220.
(3) 18 C. B. 126; 25 L. J. (C.P.) 195.
(4) 4 H. & N. 569; 28 L. J. (Ex.) 360.
(5) Law Rep. 5 Q. B. 94.

the counsel for the plaintiff further offered to prove that the defendant, in delivering in the written statement and giving the vivâ voce evidence, acted malâ fide and with actual malice, and that these statements were made without any reasonable or probable cause, and with a knowledge on the part of the defendant that they were false. I need scarcely observe that neither the charge of malice and wilful falsehood, alleged on the part of the plaintiff to be capable of proof against the defendant, nor any charge of misconduct of any kind reflecting upon the plaintiff is to be taken to be true: such charges having been merely assumed to be proveable for the purposes of argument, and in order to raise the questions to be determined in this cause. Upon these admissions and allegations the defendant's counsel insisted that the action was not maintainable, and the learned judge who tried the cause declared his opinion that the evidence so offered on the part of the plaintiff was immaterial and irrelevant, and that as matter of law the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer in the course of a military inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted malâ fide and with actual malice, and without any reasonable and probable cause, and with the knowledge that the statements made and handed in by him as aforesaid were false. Thereupon the counsel for the plaintiff excepted to the said ruling of the learned judge, and this Court is now called upon to decide whether such exception shall be allowed.

We are all of opinion that the ruling of the learned judge at the trial was right, and that the exception must be disallowed.

The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.

11 QBD 604-6

The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd* v. *Barker* (1), and many earlier authorities from 27 Edw. 3, pl. 15,

(1) 12 Co. Rep. 23.

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9 Hen. 4, 60, pl. 9, and 9 Edw. 4, 3, pl. 10, down to the time of Lord Coke; and which are to be found collected in *Yates* v. *Lansing* (1) and in *Revis* v. *Smith* (2). These two decisions, *Yates* v. *Lansing* (1) and *Revis* v. *Smith* (2), are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice. Lord Mansfield, in *Reg.* v. *Skinner* (3), observes: "Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office." Again, *Astley*, v. *Younge* (4) is an authority directly in point, that no action lies upon a false affidavit sworn in a proceeding before justices of the peace or upon a calumnious statement made in answer to such an affidavit, Lord Mansfield, there observing: "Show that a matter given as evidence in a court of justice may be prosecuted in a civil action as a libel. The court indeed, before which such evidence is given, may censure it." And further on: "And as to the reason of the thing, there can be no scandal if the allegation is material, and if it is not, the Court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record if it be upon the record." It has been argued, however, that if the matter deposed to be false to the knowledge of the deponent, an action may be maintained; and the argument is founded upon a note of Holroyd, J., in *Hodgson* v. *Scarlett*. (5) But the whole question is set at rest by the decision of the Exchequer Chamber in *Henderson* v. *Bromhead*. (6) There, as here, the plaintiff offered to prove that the matter sworn to was not only malicious and irrelevant, but false to the knowledge of the witness. But Erle, C.J., and the whole Court were unanimous that no action was maintainable. Crompton, J., expressly held that, "no action lies for words spoken or written in the course of any judicial proceeding," and that "the rule is inflexible that no action will lie for words spoken or written in the course of giving

(1) 5 Joh. 282; 9 Joh. 395.

(2) 18 C. B. 126; 25 L. J. (C.P.) 195.

(3) Lofft, 55.

(4) 2 Burr. 807.

(5) 1 B. & Ald. at p. 245; see per Alderson, B., in *Gibbs* v. *Pike*, 9 M. & W. at p. 358.

(6) 4 H. & N. 569; 28 L. J. (Ex.) 360.

evidence." And Crowder, J., referring to *Revis* v. *Smith*, held that "it was a matter of public policy that no such action should be maintained."

Finally, in *Dawkins* v. *Lord Rokeby* (1), an action between the present parties tried before the late Mr. Justice Willes, that most learned and lamented judge, in alluding to the very evidence given by the defendant before the court of inquiry, which is the subject of this action, observed: "What he stated before the court he stated in the capacity of a witness; and assuming, apart from the reasons which I have already given, that no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation; and no man who is called on to give evidence would be safe from some troublesome action being brought against him." Upon all these authorities it may now be taken to be settled law, that no action lies against a witness upon evidence given before any court or tribunal constituted according to law.

But it is insisted, on the part of the plaintiff, that a court of inquiry is not a court of law or a court of justice, and that witnesses before such a court are not within the protection of the law. On the other hand, it is contended, on the part of the defendant, that the evidence given by an officer in the army before a court of inquiry is a privileged communication, and cannot by law be made the subject of an action for defamaton. It is further objected that any such evidence is part and parcel of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and as such ought not, except by Her Majesty's command or permission, to be produced, and are, therefore, wholly inadmissible in evidence; and we are all of that opinion, and hold that on that ground also the exception must be disallowed.

It may be convenient to consider this point at once; for if it appear that the whole matter upon which the action is founded, whether the written statement handed into the court or the oral

(1) 4 F. & F. 806.

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testimony of the defendant, together with all secondary evidence of the one or the other, is inadmissible by law, and ought not to have been received or permitted to be read at the trial, it is difficult to see how the action can be maintained. A court of inquiry, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is, nevertheless, a court duly and legally constituted, and recognised in the articles of war and many Acts of Parliament.

The 12th section of the articles of war provides: "That if any officer shall think himself wronged by his commanding officer, and shall, upon due application made by him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state for war, to make his report to us thereupon, in order to receive our further directions."

Now the mode in which the commander-in-chief examines into any such complaint is by instituting a court of inquiry. A court, therefore, so called into existence has all the qualities and incidents of a court of justice. It is convened, in pursuance of this provision, and so under the express authority of Parliament, and of the Queen's regulations, which, as set forth upon this record, provide as follows: "A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report on any matter that may be brought before it; but it has no power to administer an oath nor to compel the attendance of witnesses not military." From this it follows that a military witness is compellable to attend and to give evidence. The regulations proceed: "A court of inquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the commanding officer to collect and to record information only, or it may be required to give an opinion also on any proposed question. The proceedings are to be recorded in writing as far as practicable in the form prescribed for courts martial, signed by each member, and forwarded to the

convening authority" (in this case the commander-in-chief) "by the president."

Under these regulations officers in the army, if required by competent military authority to attend, are compellable to attend and give evidence, not, indeed, by means of any known legal process, or under any penalty imposed by law, but in obedience to the duty they owe to the sovereign, and under peril of dismissal at the pleasure of the sovereign in case of disobedience. The evidence so given is in truth a communication made at the command of the sovereign, through the commander-in-chief, by a military officer, to an assembly consisting of other military officers upon a military subject, to be reported to the commander-in-chief, and by him to the sovereign; and all this in strict conformity to the queen's regulations. There is, therefore, no sound reason or principle upon which such a witness, called upon to give evidence in such a court, should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall. He is equally compellable to appear and give evidence, and punishable in case of refusal. And it would be unreasonable and unjust to hold him liable to a heavy punishment if he refuse to answer the question put to him, and liable to an action at law for damages if he answers them and his answers happen to reflect upon the character of another. It may be said that if the evidence given in a court of law be false, the witness is indictable for perjury; and that if he go out of his way to slander another by uttering irrelevant and defamatory matter, he may be fined or imprisoned for a contempt of court.

But, besides that no punishment inflicted on a false witness affords compensation or redress to the party injured, a witness before a court of inquiry, if he defames the character of another by false and malicious statements, whether relevant or not to the matter inquired into, is equally subject to punishment with a witness in a court of law, and may be put upon his trial before a Court-martial, and if found guilty may be dismissed the service, or otherwise dealt with as justice may require. And in this very case the plaintiff sought redress by demanding a Court-martial upon the defendant. And we must presume that his

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complaint was shewn to be groundless inasmuch as the Court-martial was refused. And it was upon this refusal, as it should seem, that he brings this action in a court of law.

1 Q B D 598
604

But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either House of Parliament, or by ministers of the Crown in advising the sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation. The case of *Home* v. *Bentinck* (1), when carefully considered, although decided upon a bill of exceptions to the rejection of evidence, is really an authority that the present action cannot be maintained; and, being a decision of the Exchequer Chamber, may be taken to have settled the law upon this important subject.

In that case, as in this, a court of inquiry had been held, touching the conduct of the plaintiff, convened by the Duke of York, then commander-in-chief, and a report had been made and delivered personally by the president to his Royal Highness; and the action was brought by the plaintiff against the president; the declaration charging the report as a libel. The minutes, consisting of the evidence and the report, were pro luced at the trial by the military secretary of the commander-in-chief, and it was objected that these minutes ought not to be admitted, and could not be read in evidence on behalf of the plaintiff. Abbott, C.J., held the evidence inadmissible, and it was rejected accordingly. The plaintiff then offered, as secondary evidence, a copy of the minutes; but this was also held inadmissible, and rejected by the Lord Chief Justice. Upon a bill of exceptions to the rejection of this evidence, the case came before the Exchequer Chamber, and was very elaborately argued, and all the authorities bearing upon the points in question were brought

(1) 2 B. & B. 130.

before the Court by the late Mr. Joshua Evans. The Court, however, disallowed the exception, and their judgment clearly shews that the entire proceeding before a court of inquiry is privileged, and cannot be produced, or read in evidence upon any trial at law. The court of inquiry was held to be "an official proceeding directed by the commander-in-chief, for the purpose of obtaining information which he was bound to obtain, as to the conduct of an officer holding a commission in the army, and in furtherance of the exercise of his public duty," whatever it might be upon the result of such inquiry. The duty of the then defendant, as the presiding officer, was held to be imperative upon him, and the report which he had made an act of duty imposed upon him as a military man by his superior officer, the commander-in-chief, whose order he was bound to obey. It is impossible to deny that it was equally a duty imposed upon the defendant in the present case to attend as a witness, and to give evidence upon the court of inquiry, as called upon to do by the president himself, acting under the orders of the commander-in-chief, and which orders the president and the defendant were alike bound by their duty to the sovereign to obey. And it was observed by Dallas, C.J., in delivering the judgment of the Court in *Home* v. *Bentinck* (1), that it was impossible not to see that the plaintiff in that case, when he became an officer in the army, in point of fact voluntarily subjected himself to that court of inquiry to which he must have known that officers in other instances had been made amenable. After remarking that the evidence had been returned and deposited with the commander-in-chief, the Chief Justice proceeds: "The question then is, whether, —I will not say Sir Henry Torrens would have been compelled to produce the result of this inquiry,—but whether if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not a privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence." And, further: "This is an inquiry to be made by the commander-in-chief with a view to ascertain what the conduct of the party suspected might have been; in the course of which a

(1) 2 B. & B. at pp. 161–164.

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number of persons may be called before the court, and may give information as witnesses which they would not choose to have disclosed; but if the minutes of the court of inquiry are to be produced in this way on an action brought by the party, they reveal the name of every witness, and the evidence given by each. . . . It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry and the names of persons, stand protected." And, finally: "It seems therefore to us, upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial." Surely this case—the decision of a court of error—is a conclusive authority that a court of inquiry is a tribunal authorized, recognized and sanctioned by law, and that the proceedings and the minutes of the proceedings of such a court are privileged against publication, and are inadmissible in evidence upon the trial of an action like this. We cannot doubt, therefore, that if the attention of the judge who tried the cause had been called to this decision, although the parties had admitted the evidence in question, as given before the court of inquiry, he would have felt it, to use the language of Chief Justice Dallas, "his bounden duty to have interposed and prevented the admission of such evidence." If, then, in the present case, the evidence of the proceedings before the court of inquiry was inadmissible by law, and ought never to have been permitted to have been produced in court, how is it possible that this action can be maintained?

But there is another and a higher ground upon which we are of opinion that the defendant is entitled to the judgment of the Court. The whole question involved in this cause is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold a court of inquiry, the effect of the evidence upon the military character and upon the military rights

and liabilities of the plaintiff, and indeed of the defendant likewise, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer in his military capacity upon a military subject, at the command of his military superior, and concerning the military conduct of another military officer. It may well be that the truth or falsity of the evidence given is also a military question, although apparently in terms a question of fact; and that which the plaintiff might allege, and a court of law or a jury might hold, to be false, a military tribunal might hold, and rightly hold, to be true; as if the defendant had deposed that he had given an order to the plaintiff which it was his duty to have obeyed, but which he had disobeyed. The order might have been to seize a battery, and the plaintiff might have alleged that he had done all that could be done, and that it was impracticable, and that the defendant knew that it was so; and a jury might find all this to be true. But an assembly of military officers might hold, and justly and truly, that the order might, and could, and ought to have been obeyed. With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton* v. *Johnstone* (1), and the cases *In re Mansergh* (2) and *Grant* v. *Gould* (3), *Barwis* v. *Keppel* (4), *Keighly* v. *Bell* (5), *Dawkins* v. *Lord Rokeby* (6), and *Dawkins* v. *Lord F. Paulet* (7) are all authorities to shew that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal, and not by a court of law.

On the other hand, the case for the plaintiff, when attentively considered, is really destitute of all authority to support the action. No one decision is to be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, or recognised by or according to law. There is, indeed, in the eloquent and powerful reasoning of Lord Chief Justice Cockburn in *Dawkins* v. *Lord F. Paulet* (7), much which is opposed to the view we take of the incompetence of a court of law to

(1) 1 T. R. 493.
(2) 1 B. & S. 400; 30 L. J. (Q.B.) 296.
(3) 2 H. Bl. 69.
(4) 2 Wils. 314.
(5) 4 F. & F. 764.
(6) 4 F. & F. 806.
(7) Law Rep. 5 Q. B. 94.

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deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though resting upon high authority, is no decision upon the question before us, or upon any cognate question. And it is satisfactory to us to feel that the general question of privilege, as applied to communications between military authorities upon military subjects, and whether before a military tribunal or otherwise, though governed, and, as we think, for the present decided, by the decisions referred to in the Exchequer Chamber, is yet open to final consideration before a court of the last resort.

It remains to us only to consider two cases upon which the plaintiff has relied as authorities in his favour. And, first, *Warden* v. *Bailey* (1), which, however, merely shews that the adjutant of a regiment of militia has no authority to order a private to attend a school and pay eightpence a month for instruction, and that trespass lies for causing him to be imprisoned in a common jail for disobedience to such an order. This was not an act done which, though in excess, was in the exercise of military authority or in the discharge of military duty, but was simply a wrongful and illegal act, without any colour of law, as if an officer had ordered a soldier to be imprisoned in a debtors prison for non-payment of an alleged debt. *Dickson* v. *Lord Wilton* (2), also relied upon by the counsel for the plaintiff, is distinguishable in this, that the libel there charged was a communication made by the defendant to a higher military authority, not in any proceeding before a military tribunal, or in obedience to the order of a superior officer, but which, though, as he alleged, in the discharge of his duty, was contended by the plaintiff to have been made, and was in fact made, voluntarily and of his own accord. But were the facts of the two cases identical? We think, with the majority of the judges in *Dawkins* v. *Lord F. Paulet* (3), that the motives, as well as the duty, of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a court of law to determine.

It may also be observed that the case of *Dickson* v. *Lord Wilton* (2) was a mere nisi prius decision, and not reviewed upon

(1) 4 Taunt. 67. (2) 1 F. & F. 419.
(3) Law Rep. 5 Q. B. 94.

motion for a new trial; and that the ruling of Lord Campbell, that the communication charged as a libel, though held by the Secretary for War on behalf of the Crown, should be produced from his office and read in evidence, was directly at variance with the judgment of the Exchequer Chamber in *Home* v. *Bentinck* (1); and the decision that the communication itself was for the consideration of the jury upon the question of malice was inconsistent with the great mass of authorities above referred to.

On these grounds we are all of opinion that the exception in this case should be overruled, and that the defendant is entitled to the judgment of the Court.

Judgment for the defendant.

Attorneys for plaintiff: *Guscote, Wadhand, & Daw.*
Attorneys for defendant: *Frere, Cholmeley, Foster, & Frere.*

(1) 2 B. & B. 130.

END OF HILARY TERM, 1873.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH.

IN AND AFTER

EASTER TERM, XXXVI VICTORIA.

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April 22.

LAWRENCE *v.* JENKINS.

Prescriptive Obligation to maintain Fence—Nature of the Obligation—Consequential Damage.

8 Ch 762
9 QB 265
266-7
10 Q B 114
6 Q B D 461

The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by H., and died in consequence. The defendant had had no notice of the fence having been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close:—

Held, that the evidence shewed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close; that the obligation was absolute to keep up a sufficient fence at all times, the act of God or vis major only excepted, without any notice of want of repair; that the damage was not too remote; and the defendant was therefore liable to the plaintiff for the loss of the cows.

CASE on appeal from the County Court of Monmouthshire holden at Newport.

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The plaintiff's cause of action was thus laid in the plaint. The plaintiff claims 40*l*., the damages sustained by reason of two of his cows, on or about the 27th of December, 1871, being killed from eating the foliage of a yew tree, which had been then recently felled in a wood of the defendant, which adjoins the plaintiff's land, and into which wood the cows escaped from the plaintiff's land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land, and which fence the defendant of right ought to maintain in repair.

The plaintiff was possessed of and occupied a close of land, and the defendant was possessed of and occupied another close of land, being woodland, adjoining the close of the plaintiff, and separated from it by a fence, which was on the defendant's close and was the property of the defendant.

In October, 1871, the defendant sold the fallage of the wood on his close to one Higgins, who accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy.

A short time before the 27th of December, 1871, the servants of Higgins felled a beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part of it. The beech tree was felled in a negligent manner. Whilst the beech tree lay on the fence the branches filled up the gap made by its fall; but a few days afterwards the branches were removed by the servants of Higgins, and after they were so removed, until the 27th of December, there was a considerable gap or opening in the fence, sufficiently large for cattle to pass from one close to the other, during all which time the fence was out of repair; but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken.

On the 26th of December the servants of Higgins had felled a yew tree a few yards from the fence and near the spot where the beech tree had been felled. The yew tree was allowed to remain during the night of the 26th in the place where it had been felled. During the night of the 26th the plaintiff's cows, then being lawfully upon the plaintiff's close, escaped through the gap in the fence out of the close of the plaintiff into that of the

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defendant, and in the morning of the 27th they were found on the close of the defendant near the yew tree.

About midday on the 27th the cows died; and the judge found as a fact that they died from eating some of the foliage of the yew tree, which when eaten to excess is destructive to cattle. At that time of the year there was very little verdure or green food in the fields, and the cows from being foddered on dry food were the more inclined to browse the green foliage.

Evidence was given that for more than forty years the fence had been repaired whenever repairs were necessary by the owners and occupiers of the defendant's wood; and also, that on several occasions during the last nineteen years the fence had been repaired by the defendant and his predecessors in estate upon notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of it into the close of the defendant.

It was contended for the plaintiff, first, that the facts established an obligation on the part of the defendant to repair and keep in repair the fence for the purposes aforesaid; secondly, that the damage was not too remote to enable the plaintiff to maintain this action; thirdly, that the defendant was liable in this action. Each of these points was contested by the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Butler* v. *Hunter*. (1)

The judge found as a fact that there was an obligation on the part of the defendant to repair, and keep in repair the fence, for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

He also considered that the damage was not too remote to enable the plaintiff to maintain this action.

The judge found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech tree as to prevent its falling on the hedge, or, if that was not preventible, in not tem-

(1) 7 H. & N. 826; 31 L. J. (Ex.) 214.

porarily fencing round the gap until the tree could be removed and the gap be properly stopped; and he was of opinion that it was the duty of Higgins to so cut and remove the wood as not to injure the rights of the plaintiff. He also found that, neither the defendant nor his bailiff, to whom the management of this woodland was entrusted, received notice of the fence having been broken down. And he held, on the authority of *Longmeid* v. *Holliday* (1), and *Butler* v. *Hunter* (2), that Mr. Higgins (and not the defendant) was responsible for the loss of the cows, as the result of his servants' negligence; and he directed a nonsuit to be entered.

In case of this decision being reversed on appeal, he assessed the plaintiff's damages at 40*l*.

The question for the opinion of the Court was, whether the defendant is liable in this action.

Jan. 17. *Herschell, Q.C.* (with him *Petheram*), for the plaintiff. The plaintiff's cause of action is founded, not on negligence, but on the breach by the defendant of the prescriptive obligation to maintain the fence for the plaintiff's benefit. This obligation, which is called in Gale on Easements, 4th ed. p. 460, a spurious easement, and is found by the judge to exist in the present case, must be absolute to maintain a sufficient fence at all times; and the want of notice is immaterial: see the precedent in Bullen and Leake Pr. P., pp. 329–330, where all the cases are collected. The cases, therefore, on which the judge of the county court relied, have no application.

Michael, for the defendant. Conceding the cause of action to be founded on the prescriptive obligation to fence as against the plaintiff's cattle, still the defendant cannot be held liable without having reasonable time to mend the fence after notice of the defect. This notice is expressly negatived by the case, and the evidence shewed that for nineteen years the defendant had repaired only after notice. It is clear that the defendant was not liable for the negligence of Higgins or his servants. He authorized, it is true, the felling of the trees, but not the felling of this particular tree in the way it was felled. In *Hole* v. *Sittingbourne Ry. Co.* (3),

(1) 6 Ex. 761; 20 L. J. (Ex.) 430.
(2) 7 H. & N. 826; 31 L. J. (Ex.) 214.
(3) 6 H. & N. at p. 497; 30 L. J. (Ex.) 81.

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Pollock, C.B., after putting cases in which the person authorizing the doing of the work is liable, says, "Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act. The remedy is against the person who did it."

Herschell, Q.C., in reply.

Cur. adv. vult.

April 22. The judgment of the Court (Cockburn, C.J., Mellor and Archibald, JJ.), was delivered by

ARCHIBALD, J. (1) The only point in this case as to which we felt any degree of hesitation at the time of the argument, was the question whether or not the defendant was entitled to a reasonable time to repair the fence after he might or ought to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain, at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned judge of the county court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows.

We concur in opinion with the learned judge, that the damage was not too remote; but we think that the cases cited by him: *Longmeid* v. *Holliday* (2) and *Butler* v. *Hunter* (3), are inapplicable; and, without expressing any opinion as to the liability of Higgins, we are of opinion that, if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action.

On further consideration we have come to the conclusion, upon the evidence set forth in the case, that the defendant was bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or vis major, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause.

At common law the owners of adjoining closes are not bound to

(1) The judgment was read by Mellor, J.

(2) 6 Ex. 761; 20 L. J. (Ex.) 430.

(3) 7 H. & N. 826; 31 L. J. (Ex.) 214.

fence either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises.

By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described by Gale in his work on Easements as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence: Gale on Easements, 4th ed. p. 460; *Star* v. *Rookesby* (1); *Boyle* v. *Tamlyn*. (2)

A party entitled by prescription to the benefit of the fence might formerly, by means of a writ de curia claudenda (Fitzh. Nat. Brev. 127), have compelled the adjoining owner to repair it, and have recovered damages as well for the non-repair; and a plea in an action of trespass for injury done by cattle, that the plaintiff is bound by prescription to fence against the defendant's cattle is a good plea: *Nowel* v. *Smith* (3)—the party bound by prescription being answerable to the owner for whose benefit the fence is to be maintained for all damage reasonably attributable to its defective condition.

It was held, therefore, in an anonymous case in Ventris (4), where a horse of the plaintiff's escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in the field, that the defendant was liable; and in a later case, *Rooth* v. *Wilson* (5), that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same view of the law was acted upon in the case of *Powell* v. *Salisbury* (6), where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a haystack.

In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence, in other

(1) 1 Salk. 335.
(2) 6 B. & C. at pp. 337-9.
(3) Cro. Eliz. 709.
(4) 1 Vent. 264.
(5) 1 B. & Ald. 59.
(6) 2 Y. & J. 391.

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words, in a condition sufficient both to prevent the cattle of the owner entitled to it from escaping out of his close, and also to protect him from trespasses by his neighbour's cattle, and renders it, we think, incumbent on the party upon whom the prescriptive obligation is imposed to repair the fence in time to prevent its becoming defective, and subjects him to all risks of injury that may be done to it by strangers or trespassers.

We think, therefore, that, as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff notwithstanding he had no knowledge of the injury done to the fence; and consequently that the decision of the County Court should be reversed, and judgment given for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Jones & Stirling*, for *Cathcart, Newport, Monmouthshire.*

Attorneys for defendant: *Thomas White & Sons.*

Jan. 30.*

JONES *v.* WILLIAMS.

"*Costs to abide the event*"—*New trial*—*Payment into Court*—*Result.*

If a rule for a new trial contains the term "Costs to abide the event," the "event" whereon the costs will depend is the event of the fresh contest as to the particular ground of dispute in respect of which the Court granted the rule.

RULE calling upon the defendant to shew cause why a Master of the Court should not review his taxation of costs by giving the plaintiff his costs down to and including payment into court.

An action brought by the plaintiff to recover an amount composed of two claims, viz., 61*l.* 19s. 6*d.* for work done, and 5*l.* for money lent, was tried on the 11th of July, 1871, at the Hampshire Spring Assizes, before Willes, J., when the jury found a verdict in favour of the plaintiff for the whole amount, whereupon leave was given to the defendant to move for a new trial on the ground that the

* Decided in Hilary Term.

verdict was against the weight of evidence, unless the plaintiff would consent to reduce the damages to 5*l.* 2*s.* 10*d.*, a sum to which he was, according to the expressed opinion of the learned judge, clearly entitled.

A rule was obtained for a new trial, pursuant to the leave reserved, and was made absolute, with the term "costs to abide the event."

The venue having been changed to Middlesex, the cause was set down for trial on the 24th of May, and the defendant, upon the 16th of that month, obtained an order by consent, to amend his pleas, by adding a plea of payment into court of 5*l.* 2*s.* 10*d.*, the costs of and incidental to the amendment to be the plaintiff's in any event.

That plea was then added, and payment into court made.

Upon the 28th of May the new trial took place. The jury were of opinion that the defendant was only liable to the plaintiff for the sum paid into court, and a verdict was consequently entered for the defendant.

On taxation of costs, the Master allowed the defendant his costs of the second trial; whereupon the present rule was obtained.

McIntyre, Q.C., shewed cause. (1) The term "costs to abide the event," means the substantial event of the verdict, with all costs incidental thereto. The plaintiff succeeded unjustly at the first trial, and would not be entitled to those costs unless he had a verdict in the second, carrying all such incidents. Suppose there had been no payment into court, and that 5*l.* only had been recovered on the same issue.

[BLACKBURN, J. *Dawson* v. *Harris* (2), seems to be an authority in your favour; there Erle, C.J., says, the "event" was the event of the dispute.]

Yes; because the plaintiff got an improper verdict for a larger amount than that to which he had a right he ought not to be in a better position than if he had recovered the just debt. Moreover, the provisions of the County Court Acts, limiting costs, apply.

(1) In the Bail Court, before Blackburn, Lush, and Archibald, JJ.

(2) 11 C. B. (N.S.) 801; 31 L. J. (C.P.) 168.

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[BLACKBURN, J. If the event were the same, I cannot think that the fact of the second verdict being rather below the statutory limit of 20*l.* would affect it.]

The substantial question certainly is, whether the event was such as to entitle him to costs.

[ARCHIBALD, J. He fails to recover in respect of that claim for which the new trial was granted.]

Certainly. Erle, C.J., says in the above case that the meaning of the words in question is "the event in respect of which the contest took place at the trial and upon the argument of the rule." (1)

Charles Bowen, in support of the rule. *Dawson* v. *Harris* (2) is distinguishable, for there no claim was made at the first trial under the second count of the declaration for the sum which was actually recovered thereon in the later action. But here the total amount was demanded and the general liability in contest at both trials. In *Meule* v. *Goddard* (3), where a similar phrase was discussed, it was held that the word "event" meant the ultimate event of the cause, and that therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first, the party will be entitled to the costs of the second.

[BLACKBURN, J. Because the second was annulled, and so the third took its place. That case is well enough, but neither helps nor hinders the present argument.]

When the rule was argued, the question discussed was the one of general liability, and the rule was not limited to part of the claim. The defendant took advantage of the opinion pronounced by the learned judge at the first trial, and paid money into court. Can the right of the plaintiff to costs be thus defeated when he was forced to trial because no earlier payment was made? The Master would have great difficulty in ascertaining the identity of the "event" by an inquiry into what took place at the trial and argument of the rule.

BLACKBURN, J. I think that this rule must be discharged.

(1) 11 C. B. (N.S.) at p. 803.

(2) 11 C. B. (N.S.) 801; 31 L. J. (C.P.) 168. (3) 5 B. & Ald. 766.

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JONES v. WILLIAMS.

The phrase "costs to abide the event," a term well known to the law for a long time, means if the event is the same to the party who had the verdict at the former trial the party gets his costs, and if the event is not the same the costs of the first trial are thrown away. Now, what does the word "event" as here used mean? If the matter were res integra, I should say that it means this, viz., that inasmuch as the Court granted the new trial because they were satisfied that in respect of something or other the verdict was against the weight of evidence, the "event" on which the question as to the costs of the former trial depends is the event of the ground on which the Court disturbed the first trial. In this case it appears, that after the first trial the defendant had persuaded Willes, J., and this Court, that the verdict was wrong as to 51*l.*; and if, at the second trial, it had turned out that the verdict in the first on that question was right, then it would be reasonable and proper that the plaintiff should have the costs of both trials. But when, on the second trial, it turns out that the Court was right in supposing that the verdict was against the weight of evidence as to 51*l.*, and the jury find that he is not entitled to recover, it would seem monstrous injustice to say that because he succeeds on some minor point he should have the costs of the first trial upon a verdict to which he was not entitled. That would seem to be common sense, and right and justice, apart from authority. But in *Dawson* v. *Harris* (1) I find a distinct authority on the very point in the reasons that the Court give for their decision. True, that in the report of the case in the Common Bench Reports, Erle, C.J., is stated to have said something about the event "so far as regards the matter which was before in contest" (p. 803), which does not appear in the Law Journal Report. But whether those words were really uttered or not, the ground on which the Court proceeded, rightly or wrongly, is clear, viz., that if it turns out that the ground on which the defendant set aside the verdict and got a new trial was wrong, the plaintiff is entitled to the costs of both trials; but if, on the contrary, it turns out that he who set aside the verdict was right, the plaintiff is not to have those costs; and, looking at the words Erle, C.J., is reported to have used, that seems to be the decision.

(1) 11 C. B. (N.S.) 801; 31 L. J. (C.P.) 168.

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Mr. Bowen argues that the Master cannot practically tell what that event is; but I think the Master could ascertain it more easily than many other things which he has to consider. It is his duty to ascertain what was the ground on which the Court granted a new trial, and to see if that has been determined or not. He might come to a wrong conclusion, because Masters are not infallible; but the question here for him is not half so difficult as those the Masters have daily to decide, such as the number of witnesses necessary to have been called, the amount to be paid on briefs delivered, and the like.

I would wish to add, by way of illustrating the word "event," that I do not think that the question depends entirely on damages. A conceivable case is this: An action for negligence, verdict for the plaintiff 1000*l.* The Court decide that the verdict is against the weight of evidence, and that the case should be sent to another jury. I think the "event" there would be a verdict establishing negligence, or a verdict not establishing negligence, and although it might turn out that the verdict for 1000*l.* was superseded by one for 50*l.* only, still I think that as a verdict was given for the plaintiff upon the ground of negligence, that would be a determination of the event in his favour. Where the verdict depends on the amount recovered, a special proviso would probably be made by the Court in the rule that "costs are to abide the event if the plaintiff recovers more than so and so, not otherwise." That is usually provided for in cases where the rule is granted on the ground that the verdict is against the weight of evidence by the Common Law Procedure Act, 1854, s. 44; or, as in the present case, it is specially provided for by the rule. No one can dispute that the verdict as to the 61*l.* was the real event on which the new trial was granted.

LUSH, J. I think *Dawson* v. *Harris* (1) a direct authority to shew that this rule should be discharged. In order to ascertain whether there has been the "event" in contemplation of the Court, we must see what they granted the new trial for, and what was the question between the parties. It is clear that the rule was granted in order to determine whether the plaintiff was right in contending

(1) 11 C. B. (N.S.) 801; 31 L. J. (C.P.) 168.

he was entitled to the 61*l.* or not, 5*l.* being no longer in dispute. The latter sum was paid into court, and the contest was whether he was entitled to 61*l.* The "event" in the mind of the Court was the result of his attempt to prove his right to the larger amount.

ARCHIBALD, J. A rule here was granted on the ground that the first verdict was against the weight of evidence; but the only contest was as to the excess of the claim beyond the 5*l.* And if the first verdict had been only for 5*l.*, no new trial would have been granted. Substantially, therefore, the new trial was granted to ascertain whether the 61*l.* of the first verdict was rightly or wrongly given by the jury. That was decided in favour of the defendant. Nothing was in the second trial recovered on that part of the claim, and I am therefore of opinion that the event as to which the new trial was granted has been decided in favour of the defendant.

BLACKBURN, J. I find from the Master that it is not usual to grant costs where the rule is to review his taxation, unless special circumstances appear. In the present case no costs will be allowed.

Rule discharged.

Attorney for plaintiff: *Richard Jones.*
Attorney for defendant: *F. H. Williams.*

1873
April 25.

HARRIS *v.* NICKERSON.

Auctioneer, Liability of—Withdrawal of Goods Advertised for Sale.

The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. The plaintiff, a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses:—

Held, that plaintiff could not maintain the action: for that the advertising the sale was a mere declaration and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale.

CASE on appeal from the City of London Court.

The following were the particulars of claim: This action is brought to recover 2*l.* 16*s.* 6*d.* for two days loss of time by the plaintiff, at the special instance and request of the defendant, on the plaintiff attending at a public sale by auction, advertised by the defendant in the London newspapers to be held at the town of Bury St. Edmunds, on the 14th of August, 1872, for the disposal of certain goods and office fittings under bills of sale, and on the faith of which the plaintiff duly attended, and was ready to purchase in pursuance of such request and public notification aforesaid; but the defendant, in breach thereof, did suddenly and without notice withdraw the said goods and office fittings from the sale, and by which the plaintiff lost not only his two days time and railway fare, but the additional expense of two days board and lodging.

Two days loss of time	£1	1	0
Third-class railway fare . . .	0	14	6
Two days board and lodging . . .	1	1	0
	£2	16	6

At the hearing it was proved that the sale was advertised as stated by the plaintiff, and catalogues circulated and distributed. A copy of the catalogue was put in evidence, by which it appeared that "Under bills of sale" certain brewing materials, plant, and office furniture, would be sold by auction by Mr. Nickerson (the

defendant), at Bury St. Edmunds, on Monday, 12th of August, 1872, and following days. The conditions were the usual conditions; the first being "The highest bidder to be the buyer."

It was also proved that the plaintiff had a commission to purchase at the sale the "office furniture," advertised to be sold.

The plaintiff went to Bury St. Edmunds and attended the sale, and purchased lots other than those described in the catalogue as "office furniture."

The articles described as "office furniture" were not put up for sale, but were withdrawn.

On these facts the Judge gave judgment for the plaintiff, but at the request of the defendant, gave him leave to appeal.

If the Court was of opinion that the plaintiff was not entitled to recover, the judgment was to be set aside and a nonsuit entered.

Macrae Moir, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow* v. *Harrison* (1); and *Payne* v. *Cave*. (2)

[QUAIN, J. referred to *Mainprice* v. *Westley*. (3)]

Warton, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particular person who acts upon it before it has been withdrawn. (4) He referred to *Spencer* v. *Harding*. (5)

Macrae Moir was not heard in reply.

BLACKBURN, J. I am of opinion that the judge was wrong.

(1) 1 E. & E. 295, 309; 28 L. J. (Q.B.) 18; 29 L. J. (Q.B.) 14.
(2) 3 T. R. 148.
(3) 6 B. & S. 420; 34 L. J. (Q.B.) 229.
(4) See *Williams* v. *Carwardine*, 4 B. & Ad. 621.
(5) Law Rep. 5 C. P. 561.

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The facts were that the defendant advertised bonâ fide that certain things would be sold by auction on the days named, and on the third day a certain class of things, viz., office furniture, without any previous notice of their withdrawal, were not put up. The plaintiff says, inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages from the defendant, on the ground that the advertisement amounted to a contract by the defendant with anybody that should act upon it, that all the things advertised would be actually put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses. As to the cases cited: in the case of *Warlow* v. *Harrison* (1), the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bonâ fide bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the minority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable.

QUAIN, J. I am of the same opinion. To uphold the judge's decision it is necessary to go to the extent of saying that when an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. In the present case, it is

(1) 1 E. & E. at pp. 314, 318; 29 L. J. (Q.B.) 14, 17.

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to be observed that the plaintiff bought some other lots; but it is said he had a commission to buy the furniture, either the whole or in part, and that therefore he has a right of action against the defendant. Such a proposition seems to be destitute of all authority; and it would be introducing an extremely inconvenient rule of law to say that an auctioneer is bound to give notice of the withdrawal or to be held liable to everybody attending the sale. The case is certainly of the first impression. When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow* v. *Harrison* (1), that a contract is entered into between the auctioneer and the highest bonâ fide bidder; but that has no application to the present case; here the lots were never put up and no offer was made by the plaintiff nor promise made by the defendant, except by his advertisement that certain goods would be sold. It is impossible to say that that is a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn. *Spencer* v. *Harding* (2), which was cited by the plaintiff's counsel, as far as it goes, is a direct authority against his proposition.

ARCHIBALD, J. I am of the same opinion. This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to shew authority or reason for his proposition. If a false and fraudulent representation had been made out, it would have been quite another matter. But to say that a mere advertisement that certain articles will be sold by auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not take place, is a proposition without authority or ground for supporting it.

Judgment for the defendant.

Attorney for plaintiff: *H. Sydney.*
Attorneys for defendant: *Young, Jones, Roberts, & Hale.*

(1) 1 E. & E. at p. 314; 29 L. J. (Q.B.) 14.
(2) Law Rep. 5 C. P. 561.

1873
April 22.

HAWTRY AND ANOTHER *v.* BUTLIN AND ANOTHER.

Fixtures—Mortgagor and Mortgagee—Registration under Bills of Sale Act (17 & 18 *Vict. c.* 36.)

H., a lessee for years, demised by indenture of mortgage to the plaintiffs certain buildings used as an iron factory for the residue of the term, except the last two days, and by the same indenture he also assigned to the plaintiffs all the machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest:—

Held, that the indenture, being an assignment of fixtures, was an assignment of personal chattels within the Bills of Sale Act, and required registration.

Boyd v. *Shorrock* (Law Rep. 5 Eq. 72) dissented from; *Begbie* v. *Fenwick* (24 Law Times (N.S.) 58) followed.

SPECIAL case stated under 23 & 24 Vict. c. 126, s. 15, on an interpleader and issue without pleadings.

1. The defendants recovered judgment against one F. Hamilton on the 14th of September, 1872, for the sum of 25*l.* 5*s.* 8*d.*, and 3*l.* 8*s.* 0*d.* costs of suit, making together the sum of 28*l.* 13*s.* 8*d.*

2. On the same day on which judgment was signed a writ of fieri facias was issued by the defendants against Hamilton indorsed to levy 28*l.* 13*s.* 8*d.* and 1*l.* 5*s.* costs of the writ.

3. Hamilton was, at the time of the issuing of the writ, an iron-founder, carrying on his business at the Hercules Foundry, Golden Lane, in the county of Middlesex, which premises were held by Hamilton under an indenture of lease for a term, of which about sixteen years are unexpired, which indenture of lease was assigned to Hamilton by indenture in the year 1868, and by which indenture of assignment the fixed and moveable machinery, plant, fixtures, implements, utensils, and effects fixed to or placed upon or used in the premises were absolutely assigned to Hamilton.

4. By an indenture of mortgage of the 20th of March, 1872, Hamilton demised to the plaintiffs the premises for the residue of the term, except the last two days, and assigned to the plaintiffs all and singular the fixed and moveable machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to

or placed upon or used in or about the premises and then or thereafter belonging to Hamilton, subject to redemption on payment of the amount of mortgage debt and interest. (1)

5. The fixed machinery, plant, and fixtures, assigned by the indentures of assignment of 1868, and by the indenture of mortgage of March, 1872, consisted solely of such articles as are known as trade fixtures.

6. The mortgage debt, with interest, is still owing to the plaintiffs.

7. The indenture of mortgage referred to in paragraph 4 has not been registered under the Bills of Sale Act.

8. On or about the 14th of September, 1872, the sheriff of Middlesex, by virtue of the writ of fi. fa., seized the fixed machinery, plant, fixtures, and effects, as well as the moveable or unfixed machinery and effects, all of which were at the time of such seizure in the apparent possession of Hamilton, and the plaintiffs thereupon duly claimed the fixed articles as their property under the indenture of mortgage referred to in paragraph 4. After the sheriff had issued the interpleader summons the plaintiffs paid into Court 36*l.* to abide the decision of the Court upon this case.

9. The plaintiffs contend that registration under the Bills of Sale Act of their indenture of mortgage is unnecessary in respect to the fixed machinery, plant, and fixtures, and that the same became duly vested in them by the indenture of mortgage, and are not liable to a seizure for a debt of the said Hamilton.

10. The defendants contend that in consequence of the non-registration under the Bills of Sale Act of the indenture of mortgage, the machinery, plant, and fixtures are liable to be seized under the writ of fi. fa.

11. The question for the opinion of the Court is whether the plaintiffs are entitled under the indenture of mortgage to the fixed

(1) The deed contained two operative parts; by the first, the ground, messuages, or tenements were conveyed to the plaintiffs for the residue of a term of sixty-three and a half years except the last two days thereof; by the second, Hamilton assigned unto the plaintiffs, "their executors, administrators, and assigns, all and singular the fixed and moveable machinery, plant, fixtures, implements, utensils, and effects, now or hereafter to be fixed to or placed or used in or about the said demised hereditaments, messuages, or tenements, or premises . . .

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machinery, plant, and fixtures, or whether the defendants are entitled to seize them under the writ of fi. fa.

Pearce, for the plaintiffs. This case is concluded by *Holland* v. *Hodgson* (1), in which all the authorities bearing on the question are cited. The Court then called on

Edward Wilberforce for the defendants. *Holland* v. *Hodgson* (1) is distinguishable. In that case the mortgage was in fee with the fixtures attached: the present deed demises the premises by way of underlease, and contains a separate conveyance of the fixtures. This point was adverted to in the judgment of the Court in *Holland* v. *Hodgson* (2), but as it was unnecessary to the determination of that case, no opinion was pronounced. The Court there remark: "If a tenant having only a limited interest in the land and an absolute interest in the fixtures were to convey not only his limited interest in the land, and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd* v. *Shorrock* (3), but merely as guarding against being supposed to confirm it." It is difficult to understand *Boyd* v. *Shorrock* (3), and Malins, V.C., in *Begbie* v. *Fenwick* (4) dissents from that decision. The facts in the latter case were that one Stewart mortgaged certain leaseholds for a term of years by way of underlease to one Begbie, and, by a second operative part of the same deed, also assigned certain trade fixtures to the mortgagee. This deed was not registered under the Bills of Sale Act. Shortly afterwards, Stewart executed a second deed similar to the first, to one Fenwick, who caused the deed to be registered. Stewart became bankrupt, and the question arose whether the deed to Begbie did not require registration as a bill of sale. Malins, V.C., held that it did. The above facts are similar to those in the present case. Malins, V.C., in his judgment states that he does not understand the grounds of

(1) Law Rep. 7 C. P. 328.
(2) Law Rep. 7 C. P. at p. 334.
(3) Law Rep. 5 Eq. 72.
(4) 24 L. T. (N.S.) 58.

Wood's, V.C., decision in *Boyd* v. *Shorrock* (1), and he decided directly contrary to the authority of that case.

Pearce, in reply. *Boyd* v. *Shorrock* (1) is in point, and is supported by *Mather* v. *Fraser* (2), and *Longbotham* v. *Berry*. (3)

BLACKBURN, J. In this case our judgment must be in favour of the defendants, on the ground that the deed is a bill of sale of fixtures and is not registered. The first section of the Bills of Sale Act requires a bill of sale of personal chattels to be registered, and the interpretation clause includes fixtures within the meaning of the term "personal chattels." Without the interpretation clause chattels attached to land, which a tenant has a right to remove, would not be within the first section; but the object of the statute is to protect assignees in bankruptcy and creditors, and therefore fixtures which a tenant may remove are brought within the operation of the enactment. *Holland* v. *Hodgson* (4), and *Mather* v. *Fraser* (2) shew that where land is mortgaged in fee, with fixtures attached, such as a tenant for years, if the land were leased, might remove at the determination of his lease, the fixtures pass with the conveyance of the land, because upon the mortgage in fee they are to be deemed part of the land. But when a person has a limited interest in land such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of underlease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor, unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land. If the mortgagor intended as an additional security to convey his right to sever the fixtures, I should think, if the matter were res integra, that the conveyance of the fixtures must be treated as a bill of sale of personal chattels, and would require registration. There is, however, a decision to the contrary: for in *Boyd* v. *Shorrock* (1), certain persons were tenants for years of a mill, and owners of certain trade fixtures therein; they mortgaged the mill and the

(1) Law Rep. 5 Eq. 72.
(2) 2 K. & J. 536; 25 L. J. (Ch.) 361.
(3) Law Rep. 5 Q. B. 123.
(4) Law Rep. 7 C. P. 328.

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trade fixtures, but the assignment was not registered as a bill of sale; and Wood, V.C., held, that the fixtures passed to the mortgagee without registration. I agree with Malins, V.C., in *Begbie* v. *Fenwick* (1) that it is difficult to understand the grounds on which Wood, V.C., arrived at that conclusion. If *Boyd* v. *Shorrock* (2), stood alone, I should wish to take time to consider this case, but *Begbie* v. *Fenwick* (1) is a conflicting authority, and was decided by a court of co-ordinate jurisdiction. We have, therefore, two authorities of equal weight opposed to each other, and I prefer to follow the later decision. I give my judgment for the defendants on the ground that, as the deed conveyed an absolute right to the fixtures, it was a bill of sale and required registration.

MELLOR, J. I am of the same opinion. I think the policy of the Bills of Sale Act is carried out by the decision at which we have arrived. By the interpretation clause it is quite clear that a bill of sale of fixtures must be registered. It is expressly found that the assignment was of trade fixtures, and if they alone were assigned as a security for the debt the deed of conveyance would have to be registered. It cannot make any difference that the deed conveys something else of a different nature, viz. a term of years. I think, therefore, that the assignment of the fixtures is within the policy of the Act, and it is within the express words of the interpretation clause. In *Boyd* v. *Shorrock* (2), the attention of Wood, V.C., does not seem to have been called to the interpretation clause. With all respect to the decision of Wood, V.C., I prefer the later decision of Malins, V.C., which seems to me based on a more correct view of the law. I come, therefore, to the conclusion that this deed requires registration and that our judgment ought to be given in favour of the defendants.

LUSH, J. The question is whether this mortgage deed is a bill of sale of personal chattels which requires registration. The term personal chattels is defined in the interpetration clause of the Bills of Sale Act to comprehend fixtures. Where a conveyance is made of a manufactory in fee or for a term of years, that cannot be said to be a bill of sale of chattels although machinery may pass as part

(1) 24 L. T. (N.S.) 58. (2) Law Rep. 5 Eq. 72.

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of the factory. The deed being a conveyance of the land does not require to be registered, although the machinery passes with it. That is not the case here. The mortgage is a demise by way of underlease, and if that were all, the lessee would have been entitled to the use of the fixtures only for the term, but the deed assigns an absolute property in the fixtures to the mortgagee, and that part of the deed is, therefore, a bill of sale of personal chattels. I adopt the decision of Malins, V.C., as being the sounder decision.

Judgment for the defendants.

Attorney for plaintiffs: *Steinberg.*
Attorney for defendants: *J. W. Sykes.*

BURTON, APPELLANT; EYDEN, RESPONDENT.

April 23.

Friendly Society—"Sickness"—Insanity.

By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8*s.* per week during any sickness or accident that may befall him, unless by rioting or drunkenness:"—

Held, that insanity was "sickness" within the meaning of the society's rules.

CASE stated by justices of Northamptonshire under 20 & 21 Vict. c. 43.

An information was preferred by the appellant (as parent and next friend of Samuel Burton, a member of the Stoke Bruern Friendly Society), against the respondent, as secretary of the society, for that Samuel Burton, a member of the society, was then insane and an inmate of the Northampton General Lunatic Asylum, and, as such, sick and entitled to relief from the society, which relief has been refused to him.

At the hearing, on the 2nd of July, 1871, a copy of the rules was put in, of which the following are material:—

On the first page was the preamble:

"Whereas it is a laudable custom in Great Britain for divers artists and other disposed persons to meet and form themselves into societies for the relief of such members as by illness or accident shall not be able to work at their usual employment: It is therefore agreed by us, who have entered our names in a book and subscribed, as follows:—

"Rule 11. That if any member remove from his present place of abode to any

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part of England, he shall be allowed two months to send his contribution money in, or forfeit 1s. 6d., but if he neglect to send it in three months he shall be excluded. And if the person absent shall duly send his contribution, and be there taken sick and unable to work at his trade, he shall send a certificate signed by the minister, churchwarden, and doctor of the parish where he resides, certifying how long he hath been ill, and what his disorder is. But if such member's illness shall continue for more than a month, he shall send a certificate every month as above, and on the receipt of such certificate he shall receive his money the same as if he were present.

Rule 12. If any member that hath been sick and received contribution of this society, be seen by another member or any other creditable person (after his report and before he hath declared to the stewards that he will be no more from that time chargeable to the society) to work at his trade or any other business from which he may receive any profit, he shall not only be denied the benefit of the society, but be excluded. If any member shall frequent places of gaming when he is on the box he shall be excluded.

Rule 13. That no member shall be entitled to any benefit from this society till one year be expired from the day of his entrance, and all his contributions, &c., to that time be cleared off; he shall then receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness (the venereal disease excepted), which shall be carried to him by the stewards weekly; who are required to visit and inquire after the state of the sick, for which they shall receive 3d. per mile from the box for their trouble, and accordingly make their report to this society; in case of failure, to forfeit for each offence 1s. 6d.

Rule 24. It is agreed by this society that no member shall receive any benefit from this society while he is voluntarily inoculated from the small pox, nor shall any person be admitted a member who hath any bodily infirmity upon him, except in such cases as may appear to the society to be noways likely to affect the box, and may be approved of by a majority of the members; but if any person be afflicted with any invisible disorder, and clandestinely enters this society as a sound member, he shall, when found out, be excluded.

Rule 28. That when any member falls sick he shall send a written report to the stewards, and the sick member shall send for the doctor, and if the doctor neglects to visit such member for the space of one day from the report given in by the stewards, he shall forfeit the sum of 2s. 6d.

Rule 32. That if any member shall by quarrelling, fighting, wrestling, or any other unlawful or needless exercise, fall into either sickness, lameness, or blindness, &c., he shall not be allowed the benefit of this society.

Rule 44. In cases of dispute between this society and any member or person claiming on account of a member, reference shall be made to justices pursuant to 10 Geo. 4, c. 56, ss. 27, 28. (1)

Samuel Burton was and is a member of the society. He declared

(1) The 10 Geo. 4, c. 56, is repealed by 18 & 19 Vict. c. 63, s. 1, and sch. 1; but by 21 & 22 Vict. c. 161, s. 5, where the rules of any society, established under 18 & 19 Vict. c. 63, or any of the Acts thereby repealed, shall direct disputes to be referred to justices, the proceeding is to be by complaint and summons, to be determined as under 11 & 12 Vict. c. 43.

upon the sick fund of the society by sending a certificate to the trustees signed by James Parsons Knott of Blisworth, the usual medical officer of the society, as follows:—"April 30, 1872. This certifies that Samuel Burton is unable to follow his employment from general weakness and a disease of the mind."

Burton was shortly after the date of the certificate confined as a lunatic at the Northampton county lunatic asylum, where he still remains confined as a lunatic.

Burton has not by himself or his friends received any pecuniary aid from the society, and the society have refused to make any such payment.

It was admitted that all proper notices of illness had been sent on behalf of Burton to the society.

The justices, being of opinion that insanity was not a sickness which entitled the members to relief from the society under its rules, dismissed the summons.

The question for the Court was, whether the above facts justified a dismissal of the summons or not.

Metcalfe, Q.C., for the appellant, contended that insanity was sickness within the rules of the society. He referred to rules 11 and 13, and cited *Reg.* v. *Manchester.* (1)

[QUAIN, J., referred to the preamble of the rules.]

The Court called upon

Edmund Thomas, for the respondent. He referred to the terms of the Act 18 & 19 Vict. c. 63, s. 9, subs. 2, "old age, sickness, or widowhood;" and cited *Reg.* v. *Huddersfield.* (2) In *Reg.* v. *Manchester* (1), and *Hunslet* v. *Dewsbury* (3), lunacy was assumed by the Court not to be sickness.

BLACKBURN, J. I am of opinion that lunacy is sickness within the meaning of the rules of this society. If we look at the terms of the Acts (4), they speak of sickness, old age, and widowhood, and it is quite clear that mere temporary sickness is not what is contemplated; and I see nothing in the rules themselves that confines the relief to temporary illness; and rule 11 shews that

(1) 6 E. & B. 919; 26 L. J. (M.C.) 1.
(2) 7 E. & B. 794, at p. 798; 26 L. J. (M.C.) 169.
(3) 26 L. J. (M.C.) 3 (n.)
(4) See 10 Geo. 4, c. 56, s. 2; and 18 & 19 Vict. c. 63, s. 9, subs. 2.

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the society contemplated relief at all events that would not be temporary, but might last over months.

Insanity depends on the state of mind and body of the person. The poor-law cases proceeded on Acts passed with a different object from that of friendly societies, by which it was enacted that a pauper should not be removed if his chargeability were owing to such sickness or accident as would primâ facie be only temporary; and the question arose whether insanity came within the meaning of sickness for this purpose, but no absolute decision has been come to, though it seems to have been assumed that lunacy was sickness. It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability of earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it.

QUAIN, J. I am also of opinion that insanity is sickness within the society's rules. The preamble of the rules is wide enough to include it; the words of rule 13, entitling the member to relief, are "during any sickness or accident," except certain excluded cases, insanity not being one. There is nothing to shew that temporary illness only was contemplated; and if we look at rule 32, that seems to shew that blindness was intended in general to be included, as it exempts it in particular cases, and blindness is certainly not temporary in most cases.

ARCHIBALD, J., concurred.

Case remitted to the Justices accordingly.

Attorney for appellant: *R. Metcalfe, for Whitton, Towcester.*

Attorney for respondent: *Franklin, for Greville & Franklin, Towcester.*

THE QUEEN, ON THE PROSECUTION OF HENRIETTA FRASER *v.* THE CARNATIC RAILWAY COMPANY, LIMITED.

1873
April 28.

Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 4—*Joint Stock or Incorporated Company, Duty of, to register Stock in Name of Married Woman.*

Under s. 4 of the Married Women's Property Act, 1870, on application by a married woman to a joint-stock or incorporated company to register stock in her name as a "married woman entitled to her separate use," the company must investigate the title; and if they refuse to register, the Court, unless a flaw in the title be shewn, will compel them by mandamus to register.

RULE calling on the Carnatic Railway Company, Limited, to shew cause why a writ of mandamus should not issue, commanding them to register in the books of the company, in the name of Henrietta Fraser, as a married woman entitled to her separate use, pursuant to the statute 33 & 34 Vict. c. 93, s. 4 (1), certain

(1) 33 & 34 Vict. c. 93, s. 4, "Any married woman, or any woman about to be married, may apply, in writing, to the directors or managers of any incorporated or joint stock company, that any fully paid-up shares, or any debenture or debenture stock, or any stock of such company to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use; and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred, and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman, by means of moneys of her husband, without his consent, the Court may, upon application, under sect, 9 of this Act, order such investment, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband."

Sect. 9. "In any question between husband and wife as to property declared by this Act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland; or in England (irrespective of the value of the property) to the judge of the County Court of the district in which either party resides; and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit: provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit, or on an equitable plaint would have been."

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guaranteed five per cent. stock, numbered 863 in the company's register, to which the said H. Fraser is entitled.

The company was registered under the Act of 1862 (25 & 26 Vict. c. 89). Up to April, 1872, Richard Samuel Fraser, who was husband of Henrietta Fraser, appeared in the books of the company as the owner of the stock. In April, 1872, a transfer was registered from R. S. Fraser to Henrietta Fraser, described as "wife of the above R. S. Fraser."

It further appeared from the affidavits, that in March, 1872, the husband and wife and two trustees had executed as a post-nuptial settlement an indenture by which the husband assigned to the trustees, inter alia, the stock in question; and it was declared that the trustees should hold the stock to the separate use of the wife during the joint lives of husband and wife, to the use of the wife for life if she was survivor, and then to the use of the husband.

No transfer of the stock had been made to the trustees. In April, 1872, the husband and wife executed an indenture, reciting the above deed, and that they were desirous of putting an end to the trust, and declaring that the trustees should reassign all securities, &c., comprised in the above deed, and cause the same to be vested in the wife for her sole and separate use, and that, in the meantime, the trustees should hold them in trust for the wife for her sole and separate use. The trustees were no parties to this deed. After the execution of this deed, the transfer to the wife of the stock in question was executed by the husband, and registered as above mentioned with his consent.

Afterwards, Mrs. Fraser contracted to sell the stock, but the company refused to register a transfer from her without the concurrence of her husband. This he refused.

The wife then applied to the company in writing to register her in the terms of the rule, and on their refusal obtained the rule.

Watkin Williams, Q.C. (*C. Bowen*, with him), shewed cause. The husband refuses to consent to the transfer; there is, therefore, shewn to be a dispute between the husband and wife, which must be settled under s. 9; and the company cannot be compelled to register under s. 4 until the title of the wife to the stock to her separate use is decided to be good. If the company register the

stock as belonging to Mrs. Fraser "as a married woman entitled to her separate use," they will be liable to make good the stock to a purchaser if she turns out not to be entitled: *In re Bahia and San Francisco Ry. Co.* (1)

[BLACKBURN, J. That might have been a good argument against the enactment, but as the Act makes it the duty of the company to register, their possible liability affords no answer to the rule, they must inquire and ascertain whether the married woman is entitled to her separate use, and register her as required if she be shewn to be so entitled.]

The title in the present case is not clear; the trustees have not executed a re-assignment, as contemplated by the deed of 1872.

[BLACKBURN, J. The husband executed a transfer to his wife, and consented to its being registered in the wife's name, and no transfer had ever been executed to the trustees, so that the want of their re-assignment is immaterial, though possibly they may have been guilty of a breach of trust. The husband is precluded by his consent from now interfering; the title is clearly good.]

Witt, in support of the rule, was not heard.

BLACKBURN, J. But for the late Act, the company would have had a right to refuse to register a transfer of stock by the wife without the husband's concurrence. But it is clear that this Act imposes on a company a burden which no Act has before cast upon them, of registering stock in the name of a married woman; and it becomes the duty of the company to investigate the title, and if it turns out that the married woman is entitled to the stock to her separate use, they must so register it. In the present case, the defendants fail to make out that there is any flaw in Mrs. Fraser's title, and the rule must therefore be absolute.

QUAIN and ARCHIBALD, JJ., concurred.

Rule absolute.

Attorneys for prosecution: *Pritchard & Sons.*

Attorneys for defendants: *Freshfields.*

(1) Law Rep. 3 Q. B. 584; and see *Hart* v. *Frontino Gold Mining Co.* (Law Rep. 5 Ex. 111).

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April 30.

GREGG, APPELLANT; SMITH, RESPONDENT.

Pedlars Act, 1871 (34 & 35 *Vict. c.* 96) *ss.* 3, 4—"*Pedlar.*"

Twelve ladies, of whom respondent was one, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes:—

Held, that the respondent did not come within the definition of a "pedlar" in s. 3 of the Pedlars Act, 1871, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate.

CASE stated by justices of the parts of Lindsey, in the county of Lincoln, under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, superintendent of police, against the respondent under s. 4 of the Pedlars Act, 1871 (34 & 35 Vict. c. 96), charging that she, on the 26th of August, 1872, unlawfully did act as a pedlar without having obtained a certificate under the said Act.

Upon the hearing it was proved and admitted on the part of the appellant and respondent and found as a fact, that twelve ladies, of whom the respondent was one, purchased materials and made them into aprons, handkerchiefs, chemises, shoes, and other articles of wearing apparel, and also wool mats and other articles for domestic use. These articles were carried about in a basket called a missionary basket from house to house for sale by the twelve ladies, each having the basket one month.

The respondent on the day mentioned in the information went on foot to "other men's houses" with the basket and exposed for sale and sold some of the articles named above, and had no certificate authorizing her to act as a pedlar under the Act.

The twelve ladies do not find the money for the materials out of which to make the articles, but the money derived from the sales is applied toward the purchase of them. The profits of the basket are devoted to a school in the village of Laceby and religious purposes, but 10*l.* of the profits was once given towards furnishing a minister's house.

It is also an admitted fact that under the Pedlars Act of 1870

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each of the twelve ladies took out a pedlar's certificate, the fee for which was 6*d.*, but now they do not, as, under the Pedlars Act, 1871, the fee for the certificate is 5*s.*

It was contended on the part of the respondent that the respondent did not come within the meaning of the term "pedlar" mentioned in the 1st clause of the 3rd sect. of the Pedlars Act, 1871, as she did not go about as a trader to sell for her own personal gain or profit, or as a means of livelihood, but simply for a charitable and religious purpose which was not within the spirit or contemplation of the Act.

On the part of the appellant it was contended that the respondent was a pedlar within the meaning of the Act, and that she was not one of those persons defined by the 23rd sect. who do not require certificates, and that if the legislature had intended to exempt such cases as the going about from house to house and selling for charitable or religious purposes it would have defined them in the 23rd sect.

The justices, having considerable doubt whether the respondent was a pedlar within the interpretation of the term "pedlar" mentioned in the 3rd section of the Act, so as to bring her within the operation of the 4th section, dismissed the information. (1)

The question for the Court was whether the respondent was a "pedlar" within the meaning of the Act, and liable to the penalties under the 4th sect.

Cave, for the appellant, contended that the respondent came within the definition of a pedlar given in s. 3 of 34 & 35 Vict. c. 96 (1), and cited *Rex* v. *M'Gill* (2); *Attorney General* v. *Tongue*. (3)

(1) 34 & 35 Vict. c. 96, s. 3: "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without a horse or other beast bearing or drawing for him, travels and trades on foot, and goes from town to town or to other men's houses, carrying to sell, or exposing for sale, any goods, wares, or merchandize, or procuring orders for goods, wares, or merchandize immediately to be delivered, or selling, or offering for sale his skill in handicraft."

Sect. 4: "No person shall act as a pedlar without such certificate as in this Act mentioned" . . under a penalty not exceeding 10*s.* for the first and 1*l.* for any subsequent offence.

(2) 2 B. & C. 142.

(3) 12 Price, 51.

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Waddy, for the respondent, was not heard.

BLACKBURN, J. It is quite clear that these ladies do not come within the mischief of the Act, and it is equally clear that they do not come within the definition of pedlar in s. 3. The definition says that person is a pedlar who travels and trades on foot. The Act talks of the person licensed carrying on the trade of a pedlar. It is impossible to say that the chief officer of police, who is to grant these certificates under s. 5, subs. 1, could be satisfied that these ladies "in good faith intended to carry on the trade of a pedlar." Again, the form of application for a pedlar's certificate is given in the second schedule, and on it the person applying is to state his trade and occupation, e.g., that he is a hawker, pedlar, &c. How is it possible for these ladies so to describe themselves? To say, therefore, that these ladies act as pedlars would be an abuse of language and common sense.

QUAIN, J. There is a definition of pedlar in the Act, but that includes in it one who "trades," and there is no definition of "trader" or "trading," we must therefore fall back on the ordinary meaning of that word; and I find this in Lee's Bankruptcy, p. 488: "Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living." That certainly will not include these ladies.

ARCHIBALD, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Swann & Co.*
Attorneys for respondent: *Grange & Wintringham, Grimsby.*

THE QUEEN *v.* THE JUSTICES OF KENT.

1873
May 1.

Appeal, Signature to Notice of—12 & 13 *Vict. c.* 45, *s.* 1—"*Signed by the Person giving the same or by his Attorney.*"

By 12 & 13 Vict. c. 45, s. 1, a notice of appeal to a Court of Quarter Sessions "shall be in writing, signed by the person or persons giving the same, or by his, her, or their attorney on his, her, or their behalf":—

Held, that a notice of appeal signed in the appellant's name by the clerk to his attorney with the appellant's authority was sufficient.

RULE calling upon the justices of Kent to show cause why a mandamus should not issue, commanding them to cause to be entered continuances, &c., upon the appeal of the Rev. Joseph Weld, against a certain rate or assessment made by the Commissioners of the Rother Levels, and to hear and determine the merits of the same.

On the 29th of May, 1872, the Commissioners of the Rother Levels duly made a scott or rate of certain sums per acre on all lands lying within their jurisdiction, which scott or rate was payable on the 18th of October, 1872, and the lands of Weld, amongst others, were so rated. On the 30th of November, Weld appealed against the rate to the quarter sessions. On the 31st of December the appeal was heard, and it was proved that the notice of appeal was signed in Weld's name by the clerk to his attorney, by Weld's authority. It was then objected, on behalf of the commissioners, that the notice of appeal was insufficient, as the signature of the appellant was not in his handwriting.

The quarter sessions held that the notice of appeal was bad, and dismissed the appeal.

Stanhope shewed cause. Section 1 of 12 & 13 Vict., c. 45, requires that the notice of appeal shall be "signed by the person giving the same or by his attorney." The notice is not signed by the appellant nor by his attorney; the statute therefore is not complied with, and the appeal was rightly dismissed. The object of the Act in requiring that the notice shall be signed by the appellant or by his attorney is, that there should be some guarantee that the appeal is bonâ fide; and the language of 12 & 13 Vict. c. 45, shews that the signature must be that of the appellant

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or his attorney, and of no one else. In *Hyde* v. *Johnson* (1) an acknowledgment to take a debt out of the statute of limitations signed by an agent, was held to be insufficient; in *Toms* v. *Cuming* (2) the signature by an agent to an objection under the Registration Acts to a person on the list of voters was held insufficient; and in *Miles* v. *Bough* (3) a local Act required that in all cases in which it was necessary that certain trustees should give any notice under the Act, "such notice shall be in writing, and be signed by any three or more of the trustees, or by the clerk or clerks to the trustees," and it was held that a notice signed with the names of the clerks to the trustees, but signed, in fact, not by such clerks, but by a clerk employed by them, was insufficient. In the present case the Act has pointed out the appellant or his attorney as the person to sign the notice of appeal; there can, therefore, be no delegation of that authority.

Barrow and *Biron* in support of the rule. The signature of the clerk to the notice of appeal having been affixed by the authority of the appellant, the maxim, qui facit per alium facit per se, applies, and the notice of appeal is valid. In *Toms* v. *Cuming* (2) the statute 6 & 7 Vict. c. 18, s. 100, required that the notice of objection should be personally signed by the objector; and in *Hyde* v. *Johnson* (1), the statute 9 Geo. 4, c. 14, required the acknowledgment to be signed by the party chargeable thereby. These two cases turned upon the particular words of the statutes. *Reg.* v. *Middlesex* (4), is in point. In that case the notice of appeal against an order of removal was signed by the appellant's attorney. The 9 Geo. 1, c. 7, s. 8, required that "reasonable notice be given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal." Patteson, J., says, "There is no case distinctly in point as to whether a notice of appeal signed by the attorney of the parish officers of the appellant parish is sufficient. The general principle is, qui facit per alium facit per se. That sanctions the rule that a man may ordinarily give a notice by means of his agent or attorney." Applying that general principle to this case, the notice of appeal is valid. [They were then stopped.]

(1) 2 Bing. N. C. 776.
(2) 7 M. & G. 88.
(3) 3 Q. B. 845.
(4) 1 L. M. & P. 621; 20 L. J. (M.C.) 42.

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BLACKBURN, J. No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature. It was so held in *Hyde* v. *Johnson* (1), on the ground that Lord Tenterden's Act (9 Geo. 4, c. 14) must be read in pari materiâ with the Statute of Frauds, and that, upon the construction of those statutes the legislature must be taken to have intended a personal signature. So also in *Toms* v. *Cuming* (2) it was held that a notice of objection under the Registration Acts must be personally signed by the objector, that being the intention of the legislature. But in *Reg.* v. *Middlesex* (3), Patteson, J., held that a notice of appeal might be signed by an attorney, there being nothing in the statute 9 Geo. 1, c. 7, s. 8, which required the churchwardens and overseers to sign personally. In 12 & 13 Vict. c. 45, s. 1, the language is, shall be "signed by the person giving the same or by his attorney." Here the clerk, having full authority from the appellant, signed for him, and this is a sufficient signing at common law. I see nothing in this statute that makes a personal signature necessary, and the rule must therefore be made absolute.

QUAIN, J. I am of the same opinion. We ought not to restrict the common law rule, qui facit per alium facit per se, unless the statute makes a personal signature indispensable. The doctrine laid down in *Reg.* v. *Middlesex* (3), and *Rex* v. *Abergele* (4), makes them authorities in favour of our making this rule absolute.

ARCHIBALD, J. I think this case comes within the common law rule, qui facit per alium facit per se, and there is nothing in the statute to qualify the operation of that maxim. It is easy to understand that there may be cases in which a different construction must be put on particular statutes. The rule ought, I think, to be made absolute.

Rule absolute.

Attorneys for prosecution: *Nicholls, Elliott, & Clark, for John Minter, Folkestone.*

Attorneys for defendants: *Kingsford & Dorman, for Dawes, Rye.*

(1) 2 Bing. N. C. 776.
(2) 7 M. & G. 88.
(3) 1 L. M. & P. 621; 20 L. J. (M.C.) 42.
(4) 8 Ad. & E. 394.

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April 30.

THE TRUSTEES OF MARKET HARBOROUGH AND BRAMPTON TURNPIKE TRUSTS, APPELLANTS; THE KETTERING HIGHWAY BOARD, RESPONDENTS.

Highway Turnpikes—Application of Turnpike Tolls under Local Act, 4 Vict. c. xxxv.—Contribution under 4 & 5 Vict. c. 59.

A Turnpike Act, 4 Vict. c. xxxv., after reciting that the principal sum borrowed on the credit of the tolls under former Acts still remained unpaid, together with arrears of interest thereon, and that such sums cannot be paid, nor the interest thereon discharged, nor the road kept in repair, without further powers, by s. 18 enacted that all moneys received by the trustees "shall be applied in the first place in paying and discharging any interest which may from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the roads in repair; and thirdly, in reducing and paying off the principal sums borrowed." On an application under 4 & 5 Vict. c. 59, for an order for contribution from the highway rates:—

Held, that the Act did not authorize the payment of arrears of interest before repairing the road; By Blackburn and Archibald, JJ.; Quain, J., doubting.

CASE stated by justices of Northamptonshire under 20 & 21 Vict., c. 43.

An information was exhibited by the Clerk to the Trustees of the Market Harborough and Brampton Turnpike Trust under 4 & 5 Vict. c. 59 (continued by 31 & 35 Vict., c. 95) that the funds of the trust were insufficient for repair of the road within eight several parishes in the Kettering highway district, and praying for an order of contribution.

The justices examined the state of the revenues and debts of the trust, and the condition of repairs, length of roads, &c., when it appeared that a sum of 1115*l.* 10*s.* 2*d.* was due for arrears of interest owing in respect of money borrowed on credit of the tolls up to the 6th of April, 1871, that a further sum of 524*l.* 14*s.* 9*d.* was due for the year's interest to the 6th of April, 1872, and that the interest from that date to the end of the year 1872 (the rate being reduced to 2 per cent. by a provisional order) would be 187*l.* 1*s.* 2*d.* It further appeared that the income for the current year exceeded the estimated expenditure,—including in such expenditure the year's interest from the 31st of December, 1871, to the 31st of December, 1872,—but the trustees proposed to pay out of the present year's income a sum of 854*l.* 12*s.* 11*d.* for

arrears of interest due prior to the 31st of December, 1871, after payment of which a deficiency of upwards of 800*l.* was shewn for the present year.

The estimated expenses of repairing the road for the current year were 1100*l.*, and of putting the Act into execution, 205*l.* 10*s.*

The Local Act (4 Vict. c. xxxv.), s. 1, after reciting certain previous Acts, and that considerable sums of money have been advanced upon the credit of the tolls authorized to be taken by those Acts, "which money still remains owing, together with an arrear of interest thereon, and such money cannot be paid off, or the interest thereof discharged, nor can the said road be effectually improved and kept in repair, unless further powers are granted," repealed the former Acts; and by s. 18 enacted that all moneys which shall be received by the trustees "shall be applied in the first place, after payment of the expenses of obtaining and passing this Act, in paying and discharging any interest which may from time to time be owing in respect of any money which may have been borrowed on the credit of the tolls authorized to be taken by the said recited Acts hereby repealed; secondly, in defraying the expenses of improving, maintaining, and keeping in repair such road, and in putting the Act into execution with reference thereto; and thirdly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls. . . ."

It was contended, on the part of the highway board, that the direction contained in the above clause for payment, in the first place, of any interest which might from time to time be owing in respect of any money borrowed on credit of the tolls, rendered it obligatory on the trustees to pay the interest from year to year out of the current year's income, and that in default of so doing they were not at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road. Special attention was drawn to the fact that if the funds of the trust during the present year should be rendered deficient by payment out of the year's income of the arrear of interest of former years the burden would fall upon the district fund of the Highway Board, under the Act passed last Session (34 & 35 Vict. c. 115, s. 15) instead of upon the rates of the

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several parishes through which the road passes, upon which it would have fallen had any deficiency been occasioned in former years by reason of the payment of the interest from year to year, as it became due.

The case of *Bruton* v. *Wincanton* (1) was cited in favour of an order being made, and the case of *Reg.* v. *Hutchinson* (2) was cited contra.

The justices dismissed the information, on the ground that the arrears of interest ought to have been paid out of the income of former years, in which case the funds of the trust would not have been deficient for the present year's expenditure; and that the trustees, having allowed the interest to fall into arrear, contrary to the provision contained in the application clause, were not at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road.

Manisty, Q.C. (with him *Speke*), for the appellants, contended that the object of the Act was to pay all interest, whether annual or in arrear, in preference to anything else; and relied on *Bruton* v. *Wincanton*. (1) *Reg.* v. *Hutchinson* (2) would be relied on by the respondents; but there was no recital in the Act there in question that there were arrears of interest; whereas here one of the express objects appearing in the recital was to get rid of arrears of interest.

Cave, for the respondents, contended that it was primâ facie contrary to the policy of the legislature to charge bygone debts on the annual income. Interest, in s. 18, must therefore mean the annual interest; and the arrears of interest must take rank with the principal. He referred to *Reg.* v. *South Shields*. (3)

Manisty, Q.C., in reply, contended that the construction of the respondents left arrears of interest out of the Act altogether.

[QUAIN, J. The recital of the Act is strong to show that the paying off of the arrears of interest was one of the express objects of the Act.]

The Judges having retired, on their return into court,

(1) Law Rep. 5 Q. B. 437. (2) 4 E. & B. 200; 24 L. J. (M.C.) 25.
(3) 3 E. & B. 599; 23 L. J. (M.C.) 134.

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BLACKBURN, J. I am of opinion that the justices were right, and that their decision must be affirmed. The question turns entirely upon the construction which is to be put upon the appropriation clause in this Act; whether, not only the annual interest, but arrears also may be paid previous to the repairs. There have been some cases before on this subject, but they turned on different forms of words from the present. In *Reg* v. *Hutchinson* (1) it was held that the phrase, "keeping down the interest," meant paying the annual interest, and did not include paying arrears of interest, and consequently the trustees had no power to appropriate the annual funds to the arrears before providing for the repairs. In *Bruton* v. *Wincanton* (2) the form of words was, "in paying and discharging all interest now due and owing and which shall hereafter become due," and it was held that the trustees were at liberty to apply the tolls in payment of arrears of interest in priority to the repairs of the road. On consideration, I am of opinion that in the present case the appropriation clause (s. 18) does not authorize the payment of more than the annual interest in priority to the repairs. [The learned judge read the preamble and s. 18 of 4 & 5 Vict. c. xxxv.] It is said that the preamble shews that the existence of arrears had been brought to the notice of the legislature, and that s. 18 ought to be construed accordingly. But the expression in s. 18 is "in paying and discharging any interest which may from time to time be owing," and it does not in terms say what is to be done about the arrears; and we have to consider whether arrears are included in the above terms. The effect of construing the terms only to include the annual interest will be that the annual expenses will be the first charge on the annual funds, and would throw, in fact, on the ratepayers of a particular year only any deficit after paying the annual charges; whereas, if the interest be allowed to accumulate, and if it be then allowed to take priority of the repairs, the effect is to throw on a subsequent set of ratepayers what ought to have been borne by their predecessors. This is contrary to the general rule of law that you cannot charge or make rates for bygone debts; this, no doubt, has been lately modified, but primâ facie that is still what any particular enactment must be taken to have intended. Now here

(1) 4 E. & B. 200; 24 L. J. (M.C.) 25. (2) Law Rep. 5 Q. B. 437.

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bygone arrears are not expressly provided for; and therefore they, like any other debts, must be met when there is a surplus of the fund not otherwise appropriated. That there are arrears is as much the fault of the creditors as of the trustees. Were it not for the recital in the present statute, this case would be like that of *Reg.* v. *Hutchinson* (1); for the expression, "keeping down the interest" does not seem materially different from "paying and discharging any interest which may from time to time be owing." The fact of the arrears being mentioned in the recital affords an argument, no doubt, in favour of the other construction, but it does not appear to me sufficient to lead me to that conclusion. The annual fund from the tolls must, therefore, be applied in the first instance to the annual interest only, and the arrears of interest must come in after the repairs; and consequently the funds were sufficient, and the justices were right in refusing the order.

ARCHIBALD, J., concurred.

QUAIN, J. I entertain some doubt whether the trustees are not entitled to an order in this case. I think s. 18 and the recital in the Act must be construed together. The recital expressly refers to the arrear of interest then due, and says that such interest cannot be discharged unless further powers are granted. It seems to me that s. 18 should be construed as referring to the same interest already mentioned in the recital, and therefore as extending to the arrears of interest as well as to the interest of the current year.

Judgment for the respondents. (2)

Attorneys for appellants: *Milne, Riddle & Mellor.*
Attorneys for respondents: *Ware & Hawes.*

(1) Law Rep. 4 E. & B. 200; 24 L. J. (M.C.) 25.

(2) See *Market Harborough Trustees* v. *Market Harborough Highway Board*, post, p. 327.

DIE ELBINGER ACTIEN-GESELLSCHAFT FÜR FABRICATION VON EISENBAHN MATERIEL *v.* CLAYE.

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April 18.

Contract with Agent of Foreign Principal—Right of Principal to sue.

The plaintiffs, a foreign company, entered into negotiations through S. & Co., London commission merchants, for the supply, by Mr. C. the defendant, of certain railway wheels and axles; and the defendant, in consequence, had an interview, on the 29th of January, at S. & Co.'s office, with S., one of the partners, and H., the managing director of the plaintiffs' company; and the defendant signed in a diary of S. the following entry: "Mr. C. offers to supply 150 sets of wheels and axles (describing them) at 31*l.* per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3rd of February." On the 3rd of February S. & Co. telegraphed and wrote, "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by the defendant, the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the plaintiffs sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the plaintiffs. The judge left it to the jury to say whether the contract was with S. & Co., or with the plaintiffs. The jury found for the defendant:—

Held, that the direction and verdict were right.

9 Q.B.572
9 Q.B.D.586
39.541

DECLARATION, that it was mutually agreed between the plaintiffs and the defendant that defendant should sell and deliver to plaintiffs, and plaintiffs should buy and accept from defendant, certain goods, to wit, 150 sets of Russian wheels and axles, upon the terms, amongst others, that the said goods should be delivered at Hull free on board during February or March, 1872. Allegations of performance of all conditions precedent; breach, non-delivery, alleging special damage.

Plea, inter alia, that it was not mutually agreed between the plaintiffs and defendant, as alleged; issue joined.

At the trial before Mellor, J., at the sittings in London after Hilary Term, it appeared that the plaintiffs are a company established in Elbing, in Prussia, for the purpose of manufacturing railway rolling stock; and in December, 1871, they entered into an agreement with a Russian railway company to supply 1000 railway waggons; and in order to carry out this contract Mr. Hambruck, one of the managing directors of the plaintiffs' company, came to this country, and through the agency of Messrs. Seebeck,

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Wolff, and Co., commission merchants in London, proceeded to negotiate some contracts with English ironfounders. Amongst others, Messrs. Seebeck & Co. communicated with the defendant, an ironfounder at Long Eaton; and, in consequence, the defendant came to London, and on the 29th of January, 1872, had an interview with Mr. Seebeck, one of the partners, and Mr. Hambruck, at Messrs. Seebeck & Co.'s office. The defendant was informed of the company's contract, and was asked to make tenders for wheels, &c., Mr. Hambruck producing the drawings, but Mr. Seebeck being the chief interlocutor. The defendant then signed in a diary kept by Mr. Seebeck certain memoranda, of which the following only is material:

"Mr. Claye also offers to supply 150 sets of Russian wheels and axles, 5 feet gauge, with iron tires and axles, but cast-iron bosses, to be delivered during February and March this year, at the price of 31*l.* per set of 4 wheels and 2 axles, delivered f. o. b. in Hull, less 2½ per cent. commission, payment in three months bankers' bill (at par), or 1¼ per cent. discount for cash payment, fourteen days after shipment from Hull. Three years guarantee.

"This offer to remain open until Saturday, the 3rd of February.

"S. J. Claye."

On the 31st of January the defendant wrote to Seebeck, Wolff, & Co. that he could not proceed with the wheels and axles until he had a working drawing, and saying, "Please telegraph to your clients to this effect." And again, on the 1st of February he wrote "Hoping to have confirmation of order for the 150 sets to-morrow."

On the 3rd of February Seebeck, Wolff, & Co. telegraphed to defendant, "We confirm order for 150 sets of wheels and axles, Russian pattern, with cast-iron bosses, at your price of 31*l.* less 2½ and 1¼, delivered f. o. b. in Hull during February and March this year, with your guarantee for the wheels and axles of three years."

On the same day Seebeck, Wolff, & Co. wrote a letter to the defendant as follows:

"Since we have had the pleasure of seeing your chief at our office, we have received both your favours of 31 Jan. and 1st inst.,

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contents of which we noted, and communicated to our friend the railway-carriage builder abroad.

"Although we have received in the meantime lower quotations of nearly 2*l.* per set for the 150 sets of wheels and axles of the Russian pattern, we confirmed you to-day this order by telegram, as we are desirous of commencing business with you, and believe that you will turn out first-rate quality and keep strictly to your engagement as to delivery. We consequently telegraphed to you this morning as follows:" [The telegram was then repeated.] "Enclosed we hand you a copy of these Russian wheels and axles, but with wrought-iron bosses; we hope, however, it will be sufficient for your purpose, and have in the meantime asked our friend to send us the correct drawing."

On the 3rd of February the defendant wrote to Messrs. Seebeck, Wolff, & Co.: "I reply to your telegram of this day, for which I thank you, confirming personal order for 150 sets of wheels, &c."

The invoices of the wheels and axles, when delivered, were made out to Seebeck, Wolff, & Co., and they paid the defendant for them. But the defendant failed in delivering most of the sets of wheels and axles within the time limited, upon which this action was brought.

It was objected, inter alia, on behalf of the defendant, that the defendant's contract was not with the plaintiffs, but with Messrs. Seebeck, Wolff, & Co.

The learned judge left it to the jury to say whether the contract was made by the defendant with the plaintiffs, or with Messrs. Seebeck, Wolff, & Co.

The jury found for the defendant.

Batt, Q.C., moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence. The learned judge left the question to the jury barely, whether the contract was with the plaintiffs, or with Messrs. Seebeck, Wolff, & Co. Upon the evidence he ought to have told them that, as the plaintiffs were principals, and Seebeck & Co. agents for them, the contract was with the plaintiffs. At all events, he ought to have told them, which he did not, that, though Messrs. Seebeck & Co. had contracted in their own names, or so as to make themselves parties to the contract, they yet might also have made it on behalf of the

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plaintiffs, so as to give them the right to sue for a breach of the contract, the plaintiffs having received and paid for the goods through Seebeck & Co. In the cases of *Railton* v. *Hodgson*, and *Peele* v. *Hodgson*, given in a note to *Addison* v. *Gandassequi* (1), verdicts were sustained against the defendant, who had received the goods, although the credit had been given, and the invoices made out, to third persons, who received a commission from the defendant for thus lending their credit; and Mansfield, C.J., says: "Suppose a principal authorizes a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. . . . The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable." The converse must hold good, and the seller be also liable to the buyer.

[BLACKBURN, J. If the buyer was made a party to the contract. The right to sue and the liability to be sued upon a contract are reciprocal. But this is not the case of an English principal; Mr. Hambruck was present, and yet Seebeck & Co. make the contract in their own names. And in the case of a foreign principal, there are dicta of Sir J. Mansfield (2), Lord Tenterden (3), and Bayley, J. (3), that when acting for a foreign principal, the agent or commission merchant does not, primâ facie, pledge the principal's credit. And this is clearly laid down in the judgment in the late case of *Armstrong* v. *Stokes*. (4)]

In Benjamin on Sale, p. 164, it is said: "It is settled that though in dealings of this kind it is not competent for the agent thus contracting [that is, by signing in his own name, without mentioning his principal] to introduce parol proof to shew that he did not intend to bind himself, because that would be to contradict what he had written, it is competent for the other party to shew that the contract was really made with the principal, who had chosen to describe himself by the name of his agent, just as it would be admissible to shew his identity if he had used a feigned name." And he then cites *Trueman* v. *Loder*. (5) Here the jury

(1) 4 Taunt. at pp. 576, 577.

(2) See *Addison* v. *Gandassequi*, 4 Taunt. at p. 580.

(3) See *Thomson* v. *Davenport*, 9 B. & C. at pp. 87, 89.

(4) Law Rep. 7 Q. B. at p. 605; See the passage at length, post, p. 334.

(5) 11 Ad. & E. 589.

were misled to think that the contract, having in terms been made with Seebeck & Co., it could not be with the plaintiffs; that it must be with one or the other, and could not be with both.

BLACKBURN, J. I do not entertain the slightest doubt that there is no ground whatever for granting a rule in this case. The facts appear to be that a foreign company, being desirous of having a quantity of goods supplied in England, in the ordinary course of trade, got Seebeck & Co., commission merchants resident in London, to make the contract with Mr. Claye. At the time that contract was made, Mr. Claye was well aware that the goods were ordered for the foreign company, but the offer which was afterwards accepted by Seebeck & Co. was made by him in writing in the book of Seebeck & Co. without any mention of the foreign company; and even if it had not been in writing, the ordinary course of trade would have been that the contract would be with Seebeck & Co, who would pledge the credit of their firm. I quite agree that a man may, as agent, make a contract upon such terms as not only to bind himself but also so as to bind the principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued. I must say I think that the two things are correlative. A man cannot make a contract in such a way as to take the benefit, unless also he take the responsibility of it. But although such a contract may be where the principals are English; yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorized the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain shewing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner. The dicta which I referred to of Chief Justices Sir J. Mansfield (1) and Lord Tenterden (2), and of Bayley, J. (2), are

(1) See *Addison* v. *Gandassequi*, 4 Taunt. at p. 580; See also *Paterson* v. *Gandasequi*, 15 East, 62.

(2) See *Thomson* v. *Davenport*, 9 B. & C. at pp. 87, 89.

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to this effect; and the passage which I read from the judgment in *Armstrong* v. *Stokes* (1), expressly enunciates this proposition; and I think it is quite plain that in the present case the presumption was that Mr. Seebeck was not acting under authority from the Elbinger Company to pledge their credit to Claye, and that Claye did not trust the foreigners at all, but Seebeck & Co. only.

There might, no doubt, be a contract made in a different way between the two parties bargaining together, and there might be evidence of that in the present case. My Brother Mellor left the question to the jury, was the contract made with the foreigner or not? But I cannot see any evidence on which the jury could find that in the affirmative: my only doubt is whether he ought not to have directed the jury that there was no evidence on which to find for the plaintiffs against the defendant; but he left the question to the jury, and the jury found for the defendant; and I should have felt greatly surprised if they had found otherwise. I do not, therefore, see the slightest reason to say that there was any misdirection, or that the verdict was contrary to the weight of evidence.

LUSH, J. I quite agree with Mr. Butt that an agent may make a contract by which he may become personally liable, while he still makes it on behalf of his principal, so that the other party has a choice to go against either the one or the other; that is, that the contract may be such as to make the principal as well as the agent himself a party to the contract. But if the principal be made a party to the contract, he must be both able to sue and liable to be sued; for, here, I also agree with my Brother Blackburn that he cannot be a party so as to be able to sue, and yet not a party so as to be liable on it. The evidence here excludes the one altogether, because, as I understand the evidence, the foreign principal was known to the defendant, and, in fact, was present at the time of the offer; and the jury have said in substance—and I think there is evidence to justify that conclusion—that what the defendant said in effect was, I know the goods are not for you, Seebeck & Co., but I will not deal with your foreign principal, but only with you. That being so, the foreigner is excluded both for the

(1) Law Rep. 7 Q. B. at p. 605; See the passage at length, post, p. 334.

purpose of liability and for the purpose of suing and taking the benefit of the contract.

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MELLOR, J. I am entirely of the same opinion.

Rule refused (4).

Attorneys for plaintiffs: *Thomas & Hollams.*

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May 2.

Medical Act, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32—*Apothecaries Act* (55 *Geo.* 3, *c.* 194), *s.* 21—*Right of Practitioner registered as a Member of the College of Surgeons to sue for Medicines supplied.*

Section 21 of the Apothecaries Act (55 Geo. 3, c. 194), is not repealed; and the effect of that section, coupled with ss. 31 and 32 of the Medical Act, 1858 (21 & 22 Vict. c. 90), is, that a medical practitioner, registered under the latter Act, but only as a member of the College of Surgeons, and holding no other qualification, cannot recover for attendance and medicines supplied, except in a surgical case.

CASE on appeal from the County Court of Derbyshire, holden at Alfreton.

The action was brought by the plaintiff, as trustee of the estate in liquidation of Arthur Matthews, to recover the sum of 2*l.* 19*s.* 6*d.*, for medicine supplied to, and medical attendances made upon, the defendant's wife and children by Matthews.

Matthews is a surgeon, and is registered under the Medical Act, 1858 (21 & 22 Vict. c. 90), as a member of the College of Surgeons of England. He has no other qualifications within the meaning of the Act.

At the trial it appeared that some of the items in the bill against the defendant were for medicines administered in the cure of an internal disease not requiring surgical treatment, and for advice and attendances connected therewith; and that other items were for medicines administered for the purpose of removing a

(4) On a subsequent day *W. Williams*, *Q.C.*, applied on behalf of the plaintiffs for leave to appeal, but the Court, having no doubt in the matter, refused leave. See *Hutton* v. *Bullock*, post, p. 331.

See Leman v. Housley 2 Q.B.D. 66.—S.

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complaint which it is within the province of a surgeon to attend to and cure. It was agreed between the parties that 2*l.* 14*s.* shall be taken as the value of the first-named items, and 5*s.* 6*d.* the value of the last-named items.

It was objected, on behalf of the defendant, that in order to entitle the plaintiff to recover the charges for any of the above-mentioned items, Matthews ought to appear in the Medical Register as a Licentiate of the Society of Apothecaries, inasmuch as the Apothecaries Act, 55 Geo. 3, c. 194, was not repealed by the Medical Act, 1858; and, under s. 31 of the latter Act, a person could not recover charges for medicines, and professional advice and attendance, except according to his qualification.

For the plaintiff it was contended that the Apothecaries Act was impliedly repealed by the Medical Act; that the words "according to his qualification," in s. 31 of the latter Act, applied only to the right to practise, and were inserted merely to preserve the grades of the medical profession, and did not apply to the latter part of the section giving the right to sue; that s. 31 was not to be regarded in the question before the Court, but that s. 32 was the only section to be looked at; that it was a disqualifying section, and should be construed strictly; and under it, to entitle a person to recover for any kind of professional aid, it was only necessary that he should be simply registered under the Medical Act, 1858; and that s. 34 supported this contention.

The learned judge gave judgment for the defendant, holding that ss. 31 and 32 must be read together; that by virtue of those sections the plaintiff could recover for medicines, and advice, and attendance, according to the qualifications of Matthews only; and as he possessed no other qualifications than that of a surgeon, the plaintiff was not entitled to recover any of the items.

The plaintiff having entered in the county court about 100 other cases of a similar nature, the learned judge gave leave to appeal.

The questions for the opinion of the Court were: First, whether a person entered in the Medical Register under the Medical Act, 1858, and possessing no other qualification than that of a member of the Royal College of Surgeons of England, can recover charges for medical advice and attendance, or medicines administered in

the cure of diseases or complaints not requiring surgical treatment. Secondly, whether such a person can recover for medicines administered for the purpose of removing complaints which it is within the province of a surgeon to attend to and cure.

Cave, for the plaintiff. The plaintiff was clearly entitled to the items in the surgical case, Matthews being registered as a surgeon, as was conceded in *Allison* v. *Haydon*. (1) But that case is relied on for the defendant, and it is said that, not being registered as a licentiate of the Apothecaries' Company or as a physician, Matthews could not recover the other items for medical attendance and medicine; and no doubt under the old law, Matthews not having a certificate from the Apothecaries, this would have been so, for 55 Geo. 3, c. 194, s. 21, enacted that "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he has obtained a certificate from the court of examiners;" and this was held in the above case to disable a certificated surgeon from recovering for medicines in other than a surgical case. But the law is entirely altered by 21 & 22 Vict. c. 90, and s. 21 of the Apothecaries Act is impliedly repealed, s. 32 of the new Act being substituted for it. That section enacts that "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, or attendance, or for the performance of any operation, or for any medicine which he shall both have prescribed and supplied, unless he shall prove at the trial that he is registered under this Act." Matthews was registered under the Act.

[BLACKBURN, J. He was registered as a surgeon only. Section 32 must be read in conjunction with s. 31, which enacts that "every person registered under this Act shall be entitled, *according to his qualification or qualifications*, to practise medicine or surgery, or medicine and surgery, as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances rendered or supplied by him to his patients."]

(1) 4 Bing. 619.

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Gibbon v. *Budd* (1), and *Haffield* v. *Mackenzie* (2), are authorities that s. 31 is an enabling and not a disabling section; and if so, unless s. 21 of the Apothecaries Act is still in operation (which it is submitted it cannot be) there is nothing to prevent a "legally qualified medical practitioner" or "duly qualified medical practioner," which, by s. 34 of the new Act, means any person registered under the Act, from recovering for medicines supplied: *Turner* v. *Reynall.* (3) Section 55 protects druggists, and s. 15 enables a person to be registered on payment of a fee on production of his certificate of qualification.

[QUAIN, J., referred to *Ellis* v. *Kelly.* (4)]

R. V. Williams, for the defendant, conceded that the plaintiff was entitled to recover in the surgical case; as to the other items he was not called upon.

BLACKBURN, J. By the Apothecaries Act, 55 Geo. 3, c. 194, s. 21, no apothecary was allowed to recover his charges unless he had a certificate from the Society of Apothecaries. Afterwards the Medical Act, 21 & 22 Vict. c. 90, was passed, and the question is, does that Act repeal the Apothecaries Act? There is certainly no express repeal, and I cannot see that it is impliedly repealed. On the contrary, s. 31 enables a person registered under the Act, according to his qualification, to practise medicine or surgery, or medicine and surgery, and to sue for and recover reasonable charges for his professional services, with a proviso that any college of physicians may, by a bye-law, prohibit their members from suing. Clearly, therefore, a practitioner is taken out of the operation of the old Act if he be brought within the new. But if his qualification be not medical, that is, "to practise medicine," he is not within the new Act, and he is not enabled to sue under the new Act for his attendance in a medical case. I do not see how s. 32 advances the plaintiff's case. It must be read in connection with s. 31, and being a disabling section I do not see how it has any bearing in favour of the plaintiff. It seems to me most proper that a practitioner should not be allowed to

(1) 2 H. & C. 92; 32 L. J. (Ex.) 182.

(2) 10 Ir. C. L. Rep. 289.

(3) 14 C. B. (N.S.) 328; 32 L. J. (C.P.) 164.

(4) 6 H. & N. 222; 30 L. J. (M.C.) 33.

practise or recover his charges except according to his certificate of qualification.

QUAIN, J. It is clear that every practitioner must register his qualification, and that he can only recover according to his qualification, and in a medical case in order to recover for medicines supplied he must be either registered as an apothecary or as a physician.

ARCHIBALD, J. The Medical Act was passed for the purpose of establishing a register of medical practitioners, that all persons might be able to ascertain the qualification of those they employ. By the former Act a person could not recover for medicines prescribed and supplied unless he had a certificate as an apothecary. It is said that does not apply to the present case. But by s. 31 of the new Act a practitioner can only recover according to his qualification, and Matthews was only qualified as a surgeon and not as an apothecary. Section 32 must be read with s. 31, and it is a disabling not an enabling section; and the effect is in no way to repeal s. 21 of the Apothecaries Act.

Judgment for the plaintiff for 5*s.* 6*d., and for the defendant as to the rest.*

Attorneys for plaintiff: *Eyre & Co.*
Attorneys for defendant: *Stevens & Co., for Cutts, Chesterfield.*

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May 8.

THE QUEEN *v.* KAY.

Order in Bastardy—Bastardy Laws Amendment Acts, 1872 *and* 1873 (35 & 36 *Vict. c.* 65, *ss.* 2, 3, *and* 36 *Vict. c.* 9, *s.* 8)—7 & 8 *Vict. c.* 101, *ss.* 2, 3—*Child born before the* 10*th of August*, 1872.

A single woman made application on the 22nd of May, 1872, under 7 & 8 Vict. c. 101, ss. 2 and 3, for a summons in bastardy against J. K. The child was born on the 26th of July. The Bastardy Laws Amendment Act, 1872, passed on the 10th of August, which repealed ss. 2 and 3 of 7 & 8 Vict. c. 101, and itself applies only to a child born after the 10th of August. On the 3rd of September the summons was issued; on the 11th of September J. K. appeared to the summons, and an order was made adjudging him to be the putative father, and ordering him to pay *three shillings* a week for its maintenance from the birth till it should attain the age of thirteen years.

On the 24th of April, 1873, the Bastardy Laws Amendment Act, 1873, was passed, and by s. 8, all orders made before the passing of this Act upon the father of a bastard child born before the 10th of August, 1872, for any payment in respect of such child, which would have been valid if the Act of 1872 had not passed, shall be and shall be deemed to have been valid to all intents:—

Held, that the above order must be quashed, for that it was not made valid by s. 8, as it was for *three shillings* a week, whereas 7 & 8 Vict. c. 101, s. 3, only authorized an order for 2*s.* 6*d.*, and the order would therefore not have been valid if the Act of 1872 had not passed.

RULE calling upon certain justices of Lancashire and Elizabeth Shuttleworth to shew cause why an order of the justices adjudging John Kay to be the putative father of a bastard child born of the said E. Shuttleworth should not be quashed.

E. Shuttleworth, a single woman, being then with child, made application on the 22nd of May, 1872, for a summons in bastardy under 7 & 8 Vict. c. 101, ss. 2 and 3, against John Kay. The child was born on the 26th of July; the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), passed on the 10th of August; on the 3rd of September the summons issued, and on the 11th of September Kay appeared to the summons, and the order was made.

The order recited the application of the 22nd of May, and that the child was born on the 26th of July, and that a summons thereupon issued, and that the above proceedings taken before the passing of the Bastardy Laws Amendment Acts, 1872, are now continued under the provisions of that Act, and proceeded to

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adjudge John Kay to be the putative father of the child, and ordered him to pay *three shillings* per week for its maintenance from the birth until it attain the age of thirteen years.

The order having been brought up by certiorari, this rule to quash it was obtained, on the ground that at the time it was made 7 & 8 Vict. c. 101, ss. 2, 3, had been repealed by the Act of 1872 (35 & 36 Vict. c. 65) s. 2, sch. 1; and that the Act of 1872 only applied to a child born *after* the passing of that Act (see s. 3).

J. Edwards shewed cause.

Gorst, in support of the rule.

The Court desired that a copy of the Act passed in the present session might be obtained, and a copy of the "Bastardy Laws Amendment Act, 1873" (36 Vict. c. 9), passed on the 24th of April, 1873, was obtained.

After reciting that it is expedient to amend the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), it enacts:

"Sect. 3. Any woman delivered of a bastard child on or before the tenth day of August, 1872, who, but for the repeal by the said recited Act of the enactments specified in the first schedule hereto [s. 2 and 3; s. 5, from 'provided always' to end of section; s. 7, to 'provided always'] would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows: In any case in which she would have been entitled to apply at any time within twelve months from the birth of the child, she shall be entitled to apply at any time within six months next after the passing of this Act. And in any case in which she would have been entitled to apply at any time after twelve months from the birth of the child, upon proof that the man alleged to be the father of the child had within the twelve months next after the birth of the child paid money for its maintenance, she shall be entitled to apply at any time after the passing of this Act upon the like proof; And upon any such application the same proceedings shall or may be taken, and the same consequences, including all rights of appeal, shall or may ensue, as should or might have been taken or have ensued if the said enactments had not been repealed by the said recited Act."

"Sect. 8. All orders made by any justices of the peace before the passing of this Act upon the putative father of any bastard child born before the tenth day of August, 1872, for any payment to be made by such putative father in respect of such child, which would have been valid if the 'Bastardy Laws Amendment Act, 1872,' had not passed, and which shall not have been appealed against before the passing of this Act, shall be, and be deemed to have been, valid and effectual in law, to all intents and purposes whatsoever."

The COURT (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) made the rule absolute to quash the order. The new Act (36 Vict. c. 9),

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did not cure the objection to the order. It was made for the payment of *three shillings* a week, whereas s. 3 of 7 & 8 Vict. c. 101, only enabled the justices to make an order for 2*s.* 6*d.* a week; it was therefore not an order within s. 8 of 36 Vict. c. 9, not being an order which would have been valid if the Act of 1872, had not been passed.

Neither was the case within the amendment clause (s. 7) of 12 & 13 Vict. c. 45, as the insertion of *three shillings* was not a mistake in drawing up the order, but an error in the adjudication itself. (1) The woman, however, could make a fresh application under s. 3. (2)

Rule absolute.

Attorneys for applicant: *Milne, Riddle, & Mellor.*

Attorneys for defendant: *Shaw & Tremellen, for Ainsworth, Blackburn.*

(1) See *Reg.* v. *Tomlinson*, ante, p. 12.

(2) It is to be observed that, on an application under s, 3, the same proceedings are to be taken as if 7 & 8 Vict. c. 101, ss. 2 and 3, had not been repealed; but by s. 3 of that Act, unless the application is before the birth of the child, or within two months, the order can only be for 2*s.* 6*d.* per week *from the time of the making of the application.*

END OF EASTER TERM, 1873.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXVI VICTORIA.

THE TRUSTEES OF THE MARKET HARBOROUGH AND BRAMPTON TURNPIKE TRUST, APPELLANTS;

THE MARKET HARBOROUGH HIGHWAY BOARD, RESPONDENTS.

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May 23.

Highway—Turnpike—Contribution Order—4 & 5 Vict. c. 59, s. 1—Construction of Local Act.

A Turnpike Act, 5 Vict. c. lxix. s. 1, prohibits the trustees from taking any toll on a certain part of their roads, between a town and a bridge; but enacts, by s. 2, that in case the trustees keep and continue in good repair that part of the road, then it shall be lawful for them to take on such part of the road the tolls specified. The trustees kept this part of the road in repair and took thereon the tolls specified, which were sufficient to pay for the repairs of that part of the road. But the tolls taken throughout the trust being insufficient to meet the repairs of the roads within it, the trustees, under 4 & 5 Vict. c. 59, s. 1, applied for a contribution order, inter alia, upon the parish in which the above part of the road was situate:—

Held, that the trustees were not entitled to an order.

CASE stated by justices of Leicestershire under 20 & 21 Vict. c. 43, on the refusal of an order on an application by the appellants for contribution under 4 & 5 Vict. c. 59, s. 1.

The facts and the different sections of the Turnpike Acts

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bearing on the point are fully stated in the judgment of the Court.

April 30. *Manisty, Q.C.* (with him *Speke*), for the appellants. *H. James, Q.C.* (with him *J. O. Griffits*), for the respondents, cited *Brighton Roads* v. *Preston* (1) and *Rex* v. *Netherthong.* (2)

Cur. adv. vult.

May 23. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

QUAIN, J. This is an appeal from the decision of certain justices of the county of Leicester refusing to make an order, under 4 & 5 Vict. c. 59, s. 1, on the parish of Great Bowden, in the same county, to pay a portion of the highway rate to the appellants in aid of the funds of the above turnpike trust.

The case states that a portion of an old highway within the parish of Bowden was made a part of the turnpike trust, and that the funds for the whole trust were insufficient to meet the repairs of the roads within the trust for the year ending the 31st of December, 1872, to the extent of 800*l.*; and that the proper proportion to be contributed by the parish of Great Bowden was 21*l.* 6*s.* 4*d.* The justices refused to make an order for the payment of this sum, on the ground of a special exemption of the parish of Great Bowden with regard to the part of the turnpike road within that parish by virtue of 5 Vict. c. lxix.

The first Act to which it is necessary to refer as originating the alleged exemption of the parish of Great Bowden is 1 Geo. 4, c. lxxx. ss. 18 and 19. Sect. 18, after reciting that the trustees have collected tolls on that part of the road leading from Market Harborough to St. Mary's Bridge (the road now in question), but "have not expended any part of such tolls in putting that part of the road in repair," prohibits the trustees from collecting any tolls on that part of the road. Sect. 19, however, enacts, that in case the trustees shall put and keep at all times this part of the road in good and effectual repair, it shall be lawful for them to take on this part of the road one half of the tolls which they were authorized by the recited Act to take on the other roads within the trust.

By 4 Vict. c. xxxv. this Act and the other Acts regulating the

(1) Law Rep. 5 Q. B. 146. (2) 2 B. & Ald. 179.

turnpike trust were repealed, and the repealing Act, by which the trust was in future to be regulated, contained no special provisions as to that part of the road between Market Harborough and St. Mary's Bridge. This omission was, however, supplied by an Act passed in the following year, namely, 5 Vict. c. lxix. This Act, in effect, re-enacts the provisions of 1 Geo. 4, c. lxxx., in favour of that part of the road between Market Harborough and St. Mary's Bridge, and is the Act now in force.

After referring (s. 1) to the Act 1 Geo. 4, c. lxxx., it recites, "That the repeal of certain provisions of that Act is injurious to the public, inasmuch as they are thereby subjected to the payment of an excessive toll for travelling on that part of the road between Market Harborough and St. Mary's Bridge," and the Act then prohibits the trustees from taking any toll on that part of the road. But s. 2 of the same Act provides (in the same manner as s. 19 of 1 Geo. 4, c. lxxx. above cited), that in case the trustees shall keep and continue at all times in good repair the part of the road between Market Harborough and St. Mary's Bridge, then it shall be lawful for them to take on such part of the road the tolls therein specified.

It seems to us, that the effect of this legislation is to create a special bargain between the trustees and the inhabitants of the parish of Great Bowden, to the effect that the trustees can only take tolls on this part of the road on the express condition that they keep it in repair, and that as long as they take the tolls an obligation is imposed on them to keep the road in good repair at all times.

Since the passing of this Act the trustees have continued to take tolls on this part of the road, and it is stated in the case that the tolls received at the gate across it are considerably more than sufficient to keep it in repair.

Under these circumstances the clerk of the trustees has exhibited an information before the justices under 4 & 5 Vict. c. 59, s. 1 (a public Act), alleging that the funds of the turnpike trust were insufficient for the repairs of the turnpike road within the parish of Great Bowden, and asking that a portion of the highway rate, amounting to 21*l.* 3*s.* 4*d.* should be ordered to be paid by the parish surveyor to the trustees for the purpose of such repairs.

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It was contended on the part of the trustees that, notwithstanding the special legislation before mentioned, the parish of Great Bowden, as one of the parishes within the trust, was liable to pay a contribution under 4 & 5 Vict. c. 59, s. 1, when the funds of the whole trust were insufficient to keep in repair the turnpike roads passing through the several parishes within it.

The justices refused to make the order prayed for, on the grounds stated in the case, and we think they were right in so refusing.

It appears to us, that as long as the trustees continue to take tolls on the part of the road in question under 5 Vict. c. lxix., and those tolls are sufficient to keep in repair such part of the road, they cannot be permitted to allege, as they do in the present information, that the funds of the trust are insufficient to repair that part of the road, inasmuch as they are themselves bound to keep such part of the road in good repair as long as they continue to take tolls upon it.

If an order to pay a contribution were made on the parish of Great Bowden, under 4 & 5 Vict. c. 59, s. 1, the money when received would not go into the general funds of the trust to be expended in repair of all the roads within the trust, but, on the contrary, by the express words of the Act, it would have to be wholly laid out in the actual repairs of that part of the turnpike road which lies within the parish of Great Bowden.

The contribution, therefore, if ordered to be paid, would go to relieve the trustees from the performance of the duty of repairing the road expressly imposed on them by the Act of Parliament as long as they take the tolls and those tolls are sufficient to repair it.

It would be, in effect, to permit the trustees to take the tolls without performing the condition, the performance of which is expressly imposed by the legislature before any tolls are allowed to be taken on this part of the road.

The trustees may, if they pleased, cease to collect the tolls in question: and the parish of Great Bowden, or the highway district within which it is situate, would have to repair the road like any other parish; but we are of opinion that, as long as the trustees continue to take the tolls specified in 5 Vict. c. lxix., on the part

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of the road between Market Harborough and St. Mary's Bridge, and those tolls are sufficient to keep in repair such part of the road, they must themselves keep that part of the road in good repair, and cannot, in addition to the tolls, claim to have an order made on the parish of Great Bowden for the payment of a further sum, under 4 & 5 Vict. c. 59, s. 1, to be laid out in the doing of the same repairs which the trustees are themselves already bound to perform.

For these reasons we think that this appeal should be dismissed.

Judgment for the respondents.

Attorneys for appellants: *Milne, Riddle, & Mellor.*
Attorneys for respondents: *Archbould & Hawkins.*

HUTTON AND ANOTHER *v.* BULLOCH AND OTHERS.

May 23.

Undisclosed Foreign Principal—Authority of English Merchant when buying Goods on account of Foreign Constituents—"Purchases" to be made "on joint Account" of English and Foreign Firms.

The presumption (whether it be an inference of fact or a conclusion of law) that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, applies to a case in which a foreign firm agrees that an English firm shall "purchase" and ship goods "on the joint account" of the two firms.

H. F. & Co. were merchants in London, and defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co. on their order given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" and send out goods "on the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, and 5 per cent. by the Rangoon firm, including guarantee. Plaintiff had no knowledge of defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:—

Held, that defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by plaintiff: for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract and pledge their credit with the English suppliers of the goods.

CASE stated by consent.

The action was brought to recover 3040*l.* 10*s.* 11*d.*, the amount

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of four invoices of goods delivered by plaintiffs to Messrs. Halliday, Fox, & Co., but alleged to be on the joint account of that firm and Messrs. Halliday, Bulloch, & Co., of which firm defendant Bulloch was a member. The dates of the four invoices were May 17, June 7, June 16, and August 25, 1864.

Plea, inter alia, never indebted by defendant Bulloch. Issue joined.

The case and letters and documents attached were of great length; but the facts, &c., on which the judgment of the Court proceeded are fully stated in the judgment.

The Court was to have power to draw all inferences of fact, and to amend the pleadings.'

The questions for the Court were: 1. Whether the plaintiffs are entitled to recover in this action, and for what amount, if any. 2. Whether, if the Court should be of opinion that the plaintiffs are entitled to recover against the defendant Bulloch alone, the plaintiffs should be allowed to amend by striking out the names of the other defendants, upon any and what terms.

May 2. *H. James, Q.C.* (with him *C. Bowen*), for the plaintiffs.

Watkin Williams, Q.C. (with him *Goldney*), for the defendant Bulloch.

The nature of the arguments fully appears from the judgment of the Court.

Cur. adv. vult.

May 23. The judgment of the COURT (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) was delivered by

BLACKBURN, J. In this case the plaintiffs sue the defendant Bulloch jointly with the surviving members of the firm of Halliday, Fox, & Co., for the price of four parcels of goods supplied under contracts made by Halliday, Fox, & Co., a firm established in London. These goods were paid for by acceptances of Halliday, Fox, & Co., which, on the failure of that firm, were dishonoured.

The goods were not manufactured by the plaintiffs, but by a firm of R. E. Hine & Co.; and one point made, but not much relied on, was that the action, if maintainable at all against the defendant Bulloch, ought to have been in the name of Hine & Co. We do not decide upon this ground, and therefore do not think it neces-

sary to say more than that we do not think this objection well founded.

The main question was, whether the defendant Bulloch, though not a member of the firm of Halliday, Fox, & Co., was, as an undisclosed principal, a party to the contracts under which the goods were supplied, and as such liable to be sued on those contracts; and we have come to the conclusion that he was not a party to the contracts.

A second question was raised as to whether, supposing him to have been an undisclosed principal, the state of accounts between his firm and Halliday, Fox, & Co. had been so altered before the plaintiffs made any demand on him as to afford a defence on the principle recently acted on by this Court in *Armstrong* v. *Stokes*. (1) As to this the facts are not very clear, and we think it not necessary to enter on this question.

But as to the main question, it is desirable to state the facts. Halliday, Fox, & Co. were merchants carrying on business in London. The defendant Bulloch was a partner in the firm of Halliday, Bulloch, & Co., carrying on business at Rangoon. The senior partner, Halliday, since deceased, was a member of both firms; but this makes no difference, as the firms were distinct firms, and Bulloch was not a partner in the London firm. The goods in question were supplied by the plaintiffs on the order of Halliday, Fox, & Co., in consequence of an arrangement between the two firms, as disclosed in letters hereinafter mentioned, that Halliday, Fox, & Co. should purchase and send out goods to be sold on the joint account of the two firms. The plaintiffs had no communication with Halliday, Bulloch, and Co.; nor did they, until after the registration of the deed of inspectorship by Halliday, Fox, & Co., know that the defendant Bulloch, or the firm of Halliday, Bulloch, & Co. were in any way interested in these transactions. The question therefore is whether, on the true construction of the correspondence and on the facts, the Rangoon firm were principals, and, as such, parties to the contracts made by the London firm with the plaintiffs; that is, whether they really gave authority to the London firm to establish privity of contract between them and the Manchester suppliers of the goods. For, as they were quite un-

(1) 7 Law Rep. 7 Q. B. 598.

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known to the plaintiffs, no question can in this case arise as to any clothing of the London firm with ostensible authority. In *Smyth* v. *Anderson* (1) Maule, J., says: "It is well known in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been." And in the recent case of *Armstrong* v. *Stokes* (2) it is said, in the considered judgment of this Court, "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commission merchant buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit." To this we adhere. We have power to draw inferences of fact, and therefore it is not material in this case to inquire whether this is an inference of fact, or a conclusion of law.

But it was urged that the correspondence here shewed conclusively an express authority to make the Rangoon firm parties to the contracts of purchase made by the London firm in Manchester and Glasgow.

The course of business between the two firms originated in 1860; and the letters, 25th of August, 1860, 15th of October,

(1) 7 C. B. at p. 33; 18 L. J. (C.P.) 109. (2) Law Rep. 7 Q. B. at p. 605.

1860, and the 27th of November, 1860, express the terms on which it first began. The London firm write: "We have now the pleasure to apprize you what we have done in the hope of outward shipments. . . . We propose that all *purchases* of goods at Manchester and Glasgow shall be on joint account, in the same manner as the writer has hitherto conducted a similar business to Ceylon. The commissions charged are 2½ per cent. invoice by us, and 4 per cent. in Ceylon. This includes guarantee. . . . If you agree to this, all shipments will be placed on this footing from the commencement of our correspondence."

To this the Rangoon firm answer: "We have no objection to your proposal that all purchases of Glasgow and Manchester goods shall be on joint account, relying on your experience of those markets producing a favourable result. We note the commissions charged on the invoice by you, which is satisfactory, but we think the Ceylon rate of commission, with guarantee, is too little for Rangoon, a new place where credit rates must be managed with so much caution."

In reply to this the London firm write: "As to commission on joint account you may fix it at 5%, and we will charge 2½ per cent. . . . We note that our outward business is to be on joint account."

The counsel for the plaintiffs argued that this language, and more particularly the use of the words that the *purchases* should be on joint account, shewed an intention that the two firms should be joint parties to the contracts made with the sellers in Manchester and Glasgow, and that the goods should be supplied upon their joint credit.

No doubt the parties might have so agreed, though no benefit could have thence accrued to either; and the great inconvenience which would result makes this not the usual course between foreign merchants and their correspondents; but we do not think they have expressed any such intention.

Had the Rangoon firm written to the London firm to purchase for exportation on their, the Rangoon's firm's, account, we think, as already stated, that the course of business would shew that it was not intended that the Rangoon firm should be parties to the contract of purchase; and we do not think that the fact that

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the purchase was for exportation on joint account makes any difference, or raises a stronger presumption that it was intended that the Rangoon firm should be parties to the contract with the sellers.

7 B. & S. 573.

We think the fair construction of the letters is, that the London firm were to purchase the goods and charge commission just as if the goods were consigned outwards on the sole account of the Rangoon firm; but that the consignment outwards should be for their joint account. This was not intended to alter in any way the mode in which the purchase of the goods was to be effected; which was to be by the London firm on the best terms they could obtain, by a contract between them and the suppliers of the goods to which the foreign Rangoon house was not to be a party, though the London firm had agreed to appropriate the goods to exportation on joint account, when purchased. This we think consistent with the general usage of trade.

Besides, that this was the way in which the parties understood the arrangement appears from the manner in which the purchases were made and paid for by the London house. The goods were invoiced from plaintiffs to Halliday, Fox, & Co., charging a commission of 2 per cent. on the net invoice price, and further adding interest at the current rate for six months, as Halliday, Fox, & Co. paid by a six months acceptance. The same goods were invoiced from Halliday, Fox, & Co. to Halliday, Bulloch, & Co. at the original gross invoice price, adding the charges and the agreed commission of 2½ per cent. This was the course of business followed in the first three transactions, the subject of this action. The invoices sent to Rangoon do not shew the mode of payment at Manchester; nor does it appear that Halliday, Bulloch, & Co. were informed of it in any other way. It would appear, therefore, that Halliday, Fox, & Co. paid for the goods in their own way without any reference to Halliday, Bulloch, & Co.

If the Rangoon firm was not in any way responsible to the Manchester suppliers, and had no concern with the mode in which the London firm settled with them, this conduct was quite justifiable. But if the Rangoon firm were, as the plaintiffs say, parties to the contracts, we should expect that the exact way in which the purchases at Manchester were paid for would have been disclosed.

It is true that the invoice of the 4th transaction sent to Rangoon does disclose the mode of payment at Manchester; but we collect that that invoice was made out under some exceptional circumstances not explained, and was not in accordance with the previous and usual course of business.

We therefore answer the first question in the defendant's favour, which renders it unnecessary to answer the second question.

Judgment for the defendant.

Attorney for plaintiffs: *Kearsey.*

Attorneys for defendant: *Thomas & Hollams.*

FITZPATRICK, APPELLANT; KELLY, RESPONDENT.

June 4.

Adulteration of Food, &c.—35 & 36 Vict. c. 74, ss. 2, 3—Selling Articles of Food "as Unadulterated."

By 35 & 36 Vict. c. 74, s. 2, "every person who shall sell as unadulterated any article of food or drink which is adulterated . . ." shall forfeit a penalty not exceeding 20*l*. By s. 3, "any person who shall sell any article of food or drink, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser before delivering the same, shall be deemed to have sold an adulterated article of food or drink, under this Act."

An information was laid against the respondent for that he sold as unadulterated an article of food, to wit, butter, which was adulterated. It was proved that an inspector of nuisances went to the shop of respondent and asked for "a pound of butter at 7*d*.," and the shopman handed to him a pound, the respondent being present; on being analysed, it was proved to have been largely adulterated with lard, tallow, &c., or material of that nature. The police magistrate was of opinion that it was necessary to prove that the butter when sold was represented as unadulterated, and that it was also necessary to prove that respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk, and he therefore dismissed the information. On appeal:—

Held, that it was not necessary that any express representation that the article sold was unadulterated should be made at the time of sale of a simple article like butter; butter was asked for, and something handed over as butter, and that was selling "as unadulterated." Secondly, that s. 3, whatever might be its effect, was not intended to cut down s. 2; it was merely adding an additional offence. The case must therefore be remitted to the magistrate for re-hearing.

CASE stated by the police magistrate for the borough of Liverpool, under 20 & 21 Vict. c. 43.

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The appellant laid an information against the respondent for that he did on the 28th of November, 1872, sell as unadulterated an article of food, to wit, butter, which was adulterated contrary to 35 & 36 Vict. c. 74, intituled "An Act to amend the Law for the Prevention of Adulteration of Food and Drink, and of Drugs."

By s. 2 of the statute it is enacted that "every person who shall sell any article of food or drink, with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated," shall on conviction forfeit and pay a penalty not exceeding 20*l.*

By s. 3, "any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same and no other [sic], shall be deemed to have sold an adulterated article of food or drink, or drug, as the case may be, under this Act."

Sect. 4 incorporates the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), and 23 & 24 Vict. c. 84. Sect. 6 authorizes the inspector of nuisances to procure and submit samples of articles of food or drink, or drugs suspected to be adulterated, to be analysed by the analysts appointed under the Act, and requires the inspector, on receipt of a certificate from such analyst, stating that the articles of food, drink, or drugs are adulterated, to cause a complaint of an offence against the Act to be made.

Upon the hearing of the information, it was proved that an inspector of nuisances authorized in that behalf went to the shop of the respondent, who is a provision and butter dealer, and said to an assistant in the shop, "A pound of butter at 7*d.*" The assistant then handed to the inspector a pound of butter in a saucer. The respondent was present at the time, and it was proved that the inspector, after he had received and paid for the butter, gave him notice of his intention to have the article analysed, and that a reasonable opportunity was afforded to the respondent to accompany the inspector to the analyst, as required by s. 3 of 23 & 24 Vict. c. 84. It was proved to the magistrate's satisfaction

that the requirements of ss. 8 & 10 of 35 & 36 Vict. c. 74 had been duly observed.

The analyst delivered the following certificate as to a portion of the butter purchased by the inspector: "Sample No. 56. Butter.

"Result of analysis:—This contains a quantity of stearine and palmitin; it is therefore largely adulterated by the admixture of fats containing these substances (the most common of these are lard, tallow, dripping, palm oil, and the fat from certain seeds). This adulteration is not necessarily injurious to health."

The analyst was called on the part of the appellant, and gave evidence that, in his opinion, the butter was adulterated in the manner set out in the certificate.

The counsel for the respondent, before entering upon merits, contended that in order to convict the respondent it was necessary to prove that it had been represented at the time of the sale that the butter was unadulterated; and that it was also necessary, under s. 3, that it should be proved that the butter was sold by some person knowing the same to have been mixed with some other substance, with intent fraudulently to increase its weight or bulk. No evidence on this point was tendered.

The appellant's attorney contended that it was sufficient to prove that the inspector asked for butter, that an article was handed to him for which he paid the price named, and that the article was mixed with some foreign substance, i.e., adulterated in the ordinary sense of the word, in order to throw upon the respondent, he being a dealer in the article, the burden of proving that he did not sell the article "as unadulterated," and that "he did not know the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk."

The magistrate was of opinion that in law it was necessary on the part of the appellant to prove that the butter when sold was represented as unadulterated, and that it was also necessary for the appellant to prove that the respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk. The magistrate, therefore, without calling upon the respondent for his defence, dismissed the summons.

The questions of law were: 1. Whether it was necessary for the

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appellant to prove that when the butter was bought it was represented to be sold as unadulterated. 2. Whether it was necessary for the appellant to prove that the respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk.

If the opinion of the Court be in the affirmative upon either of the questions, the dismissal was to stand affirmed; if otherwise, the case was to be remitted to be re-heard.

Milward, Q.C., for the appellant. The magistrate was wrong on both points. The information was under the second clause of s. 2 of 35 & 36 Vict. c. 74; and no express declaration was necessary at the time of sale that the article was unadulterated; the mere sale of an article like butter as "butter," is "selling as unadulterated." The Act recites that the practice of adulterating articles of food and drink requires to be repressed by more *effectual laws;* and it incorporates, by s. 4, 23 & 24 Vict. c. 84; and s. 2 of the new Act is merely a re-enactment of s. 1 of the other Act, leaving out in the second clause as "pure or" before unadulterated, and "or not pure," after adulteration. But s. 3 is a totally new enactment, and is intended, whatever it means, to create another offence altogether, in addition; and it has no bearing whatever on s. 2. It cannot, as the magistrate seems to have thought, have been intended to have any operation on s. 2; for if it had, it would entirely override it, and the Act, so far from making the law more effectual for repressing adulteration, would, in fact, render a conviction impossible.

Segar, for the respondent. The new Act, while intending to repress adulteration, is careful of the honest tradesman, and it may well have been intended to render knowledge in all cases necessary; and thus looked at, it will be seen that s. 3 was meant to define adulteration, rendering knowledge necessary: otherwise an innocent retailer would be made to suffer for the act of the person from whom he bought. It is to be observed that s. 3 cannot be intended to create a substantive offence; there is no penalty attached. It cannot be meant that a person shall be guilty of an offence by merely selling an article which turns out to have been adulterated without his knowledge. There must, therefore, under

the second clause of s. 2 be an express representation that the article is unadulterated, and then, of course, the seller guarantees it is genuine, and must suffer the consequences of his misrepresentation.

[QUAIN, J., referred to s. 6.]

Milward, Q.C., was not heard in reply.

BLACKBURN, J. I think that on both points the magistrate was wrong. It appears that the inspector went into the respondent's shop and asked for a pound of butter, and something was handed to him across the counter, the respondent being present, which turned out to be adulterated butter. The magistrate, on two grounds, refused to convict. It appears evidently from the statement in the case, that he was of opinion that, unless the person selling the adulterated article said at the time of sale, "This is unadulterated," he could not be convicted; and also that it was necessary to show that he knew that the article had been mixed with some other substance in order to increase its weight and bulk. Now, the Act, after reciting that the practice of adulterating articles of food and drink required to be repressed by more effectual laws, by s. 1 imposes a penalty of 50*l.* upon any person who wilfully admixes with any article of food or drink any injurious or poisonous ingredient to adulterate it for sale. Then by s. 2 it is enacted, that every person who shall sell any article of food or drink with which, to his knowledge, any ingredient injurious to health has been mixed, and every person who shall sell as unadulterated any article of food or drink which is adulterated, shall forfeit a penalty not exceeding 20*l.* So that, whereas the first clause requires knowledge on the part of the seller, and makes it an offence to sell articles adulterated so as to be injurious to health, whether he represents them as unadulterated or not; the second clause does not require knowledge, but that the seller should sell "as unadulterated" articles which are adulterated; that does not necessarily involve that he should expressly represent that the article is unadulterated, but that he should sell it in such a way as to lead the buyer to suppose that it is unadulterated, and he does this when he sells a simple article like butter by name as butter. The sale of an adulterated article as unadul-

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terated may well be made punishable without knowledge on the part of the seller, for a very little trouble would enable a tradesman to ascertain, if he wishes to avoid all danger, that the articles he sells are not adulterated; or he may, if he likes, proclaim that he does not sell unadulterated articles, and then, unless they are adulterated to his knowledge so as to be injurious to health, he will be safe. The second ground on which the magistrate refused to convict seems to have arisen from a mistaken notion that it was necessary, in order to a conviction under s. 2, to show, under s. 3, that the seller knew the article to have been adulterated so as fraudulently to increase its bulk or weight; but this is clearly not so. Sect. 3 is very difficult to understand, but it is perfectly clear that it does not mean to relax the law as enacted in s. 2 in favour of the seller, but to add another offence to be treated as adulteration, viz., the addition of some foreign body so as to increase the bulk or weight without actually adulterating; Thus, if a man fraudulently inflated food so as to contain great air holes or bubbles, this might be within the section: however, whatever the section means, it does not cut down or in any way qualify s. 2. It was intended to increase or extend, not diminish, the seller's liability.

I am, therefore, of opinion that the magistrate went completely wrong on both points; and the case must be remitted to him to hear the information on the merits, according to the interpretation which the Court puts on the Act.

QUAIN, J. I am of the same opinion. When a man asks for butter, and the tradesman, without more, sells him an article which seems to be butter, the representation is that the article is butter, that is, unadulterated butter, and not adulterated with dripping, and all or any of the filthy ingredients suggested in the present case. The sale of an article by the name of butter is a representation that it is what the customer asked for, viz., butter, and he did not ask for adulterated butter. It is clear there need not be an express representation or statement that the article is unadulterated. On the second point the magistrate seems to have thought that s. 3 contained a definition of what was adulteration within the Act. But that would be to strike the second clause out of s. 2 altogether. There is not the slightest pretence for such

a construction, which would allow of the sale of an article, however adulterated, as long as it was not injurious to health and had not had its bulk or weight fraudulently increased to the knowledge of the seller. The magistrate, therefore, was clearly wrong on both points.

ARCHIBALD, J. I agree that the magistrate was wrong on both points. This is a most valuable and useful Act, and the construction put upon it by the magistrate would render it almost a nullity. First, the magistrate was of opinion that the respondent must have represented, that is, made a statement, that the butter was unadulterated. But a representation may be made by the language used by the parties, coupled with circumstances, without an express statement that the thing is unadulterated. And if a man comes to a shop and asks for a simple article like butter or sugar, and in consequence of his request something is handed to him by a person in the shop, that is surely a representation that the article supplied is what the customer asked for—"butter" or "sugar;" and the person supplying it is selling "as unadulterated an article of food or drink." It is to be observed that the first part of s. 2 makes it an offence to sell an article knowing it to be adulterated so as to be injurious to health, whether he stated that it was adulterated or not. Not so under the second clause: that makes it an offence to sell as unadulterated an article which is adulterated, whether the seller knew it or not; but then he may make himself safe by declaring the article to be mixed with other ingredients, so long as those ingredients are not, to his knowledge, injurious to health. Sect. 6 confirms this view. There is no qualification that when the sale is shown to have been with knowledge of adulteration the information is to be laid, but that when any article sold is found by the analyst to have been adulterated, the seller is at once to be called upon to answer for the sale. The Act was intended, in fact, to secure all persons an unadulterated article when they buy it as unadulterated. That s. 3 was intended to cut down the operation of s. 2 appears to me entirely untenable. There might be a doubt whether, where a substance was not chemically combined nor mixed with the article, there was an adulteration, and it was intended to bring a mere addition of a foreign substance

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with intent fraudulently to increase the weight or bulk within the offence of adulteration, without in any way cutting down s. 2.

PER CURIAM:

Case to be remitted with the opinion of the Court for re-hearing; costs in this Court to abide the event.

Attorneys for appellant: *Venn & Son, for Rayner, Liverpool.*

Attorneys for respondent: *Vizard, Crowder, & Co., for Yates & Martin, Liverpool.*

May 31.

THE QUEEN *v.* THE CHESHIRE LINES COMMITTEE.

Special Constable, Appointment of, under 1 & 2 *Wm.* 4, *c.* 41, *s.* 1—*Order for Payment of Expenses—Notice to Party liable to pay.*

An order was made by justices, which, after reciting that a special constable had been appointed pursuant to 1 & 2 Wm. 4, c. 41, and that the appointment was occasioned by the behaviour, and by reasonable apprehension of the behaviour of the persons employed on the defendants' works, ordered the defendants, in pursuance of 1 & 2 Vict. c. 80, to pay to the special constable the sum of 3*l.* 9*s.* for his services as special constable. The defendants had no notice either of the appointment of the special constable or of the order for payment by them until after the same was made:—

Held, that the making of the order for the payment of the expenses of the special constable was a judicial proceeding, and that the defendants were entitled to notice before the order was made.

RULE calling upon certain justices and Joseph Hume to shew cause why an order of the justices brought up by certiorari, ordering the defendants to pay to Hume the sum of 3*l.* 9*s.*, for serving as special constable, should not be quashed, on the ground that the defendants had no notice of the application for such order, and no opportunity of shewing cause against its being made.

It appeared from the affidavits, that by the Cheshire Lines Transfer Act, 1865 (28 & 29 Vict. c. cccxxvii.), the West Cheshire Railway Company was transferred to and vested in the Manchester, Sheffield, and Lincolnshire Railway, the Great Northern Railway Company, and the Midland Railway Company, and the management of the undertaking and the control of the funds and revenue, was invested in a committee, called the Cheshire Lines

Committee, and that a railway and works were in course of construction in the township of Barrow, by certain contractors for the committee, and certain persons, reasonably apprehending that there would be a tumult and riot in the township, and that the ordinary constables appointed for preserving the peace were not sufficient in number for the preservation of the peace or for the protection of the inhabitants and the security of property, made an application to two justices under 1 & 2 Wm. 4, c. 41, s. 1 (1),

(1) 1 & 2 Wm. 4, c. 41, s. 1, enacts: "... That in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place, or may be reasonably apprehended, in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place, as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint by precept in writing, under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables for such time and in such manner as to the said justices respectively shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants and the security of the property in such parish, township, or place."

1 & 2 Vict. c. 80, s. 1: Whenever any constable shall be appointed under 1 & 2 Wm. 4, c. 41 . . . "and it shall be made to appear to any two or more justices of the peace of any county, riding, or division, having a separate commission of the peace, or of any liberty, franchise, city, town, or borough in England or Wales, on the oath of three or more credible witnesses, that the appointment of such special constables has been occasioned by the behaviour or by reasonable apprehension of the behaviour, of the persons employed upon any railway, canal, or other public work, made or carried on under the authority of Parliament within the district or division for which such justices usually act, it shall be lawful for such justices as aforesaid, at any time not exceeding one calendar month next after such appointment, to make orders from time to time upon the treasurer or other officer who shall have the control or custody of the funds of any company making or carrying on such railroad, canal, or other public work, for the payment of such reasonable allowances for their trouble, loss of time, and expenses, to such special constables who shall have so served or be then serving, as to the said justices shall seem proper; and a copy of every such order shall be sent by the justices to one of Her Majesty's principal secretaries of state, and such order if allowed

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for the appointment of a fit person as special constable. The justices appointed one Joseph Hume to act as special constable for the township of Barrow, for the space of twelve calendar months; and afterwards, it being made to appear to the justices making the order on the oath of three credible witnesses, that the appointment of the special constable was occasioned by the behaviour and by reasonable apprehension of the behaviour of persons employed on the defendants' railway works, the justices, under 1 & 2 Vict. c. 80, s. 1, made an order on the defendants, as the persons having the control of the funds of the company carrying on the railway works, to pay to Hume 3*l.* 9*s.* for his trouble, loss of time, and expenses, incurred by him in serving as such special constable.

It further appeared from the affidavits that no notice of the application for the last-named order had been given to the committee, and that they had no opportunity afforded them to resist its being made, or to shew cause before the justices why such order should not have been made.

McIntyre, Q.C., shewed cause. The justices had jurisdiction to make the order. It is quite clear that under 1 & 2 Wm. 4, c. 41, s. 1, the justices have power on an ex parte application, to appoint a special constable. Then comes 1 & 2 Vict. c. 80, which enacts, that where a special constable has been appointed, and it should be made to appear to the justices on the oath of three credible witnesses, that the appointment of the special constable has been occasioned by the behaviour or by reasonable apprehension of the behaviour of the persons employed on any railway, an order be made on the persons having control of the funds of the company for the payment of the expenses of the constable. It is nowhere stated in the section that, before such order is made, notice of an intention to make the order shall be given to the parties; on the contrary, the inference is that no notice need be

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by the secretary of state shall be binding on such company and on every such treasurer and officer thereof. Provided always, that nothing herein contained shall empower any such justices to order any allowance for any such special constables at the rate of more than five shillings daily to be paid to each special constable employed for the purposes aforesaid."

given, for the justices are to make the order, if it appear to them, on the oath of three witnesses, that the appointment of the constable had been occasioned by the behaviour of the persons employed by the defendants. It is difficult to see, if they are satisfied with the testimony of three witnesses, what necessity there is for them to hear the parties. By implication, the justices, it would seem, may make the second order also on an ex parte application. If the defendants are dissatisfied with the order they should have appealed under s. 2 to the secretary of state, who has power to disallow the order in part or in whole, and if the order be disallowed, the amount of part or of the whole is to be paid out of the public rates.

[QUAIN, J. The justices cannot make an order on the defendants to pay money, which if they do not pay can be enforced by distress under s. 3, without giving them an opportunity of being heard. An appointment of a constable and an order for the payment of money are very different. Besides, the order after being made, is to be sent by the justices to the secretary of state, and if allowed, is to be binding; there is no opportunity for the defendants to appeal to the secretary of state.]

The operation of 1 & 2 Vict. c. 80, is that the order for the payment of the expenses of the constable is to be made, ex parte, and sent to the secretary of state, and if allowed by him, it is to be binding on the defendants; the amount would then be demanded of them, and they would then have notice of the order, and under s. 3, they would have three weeks in which to pay the amount, and in the interval they would have an opportunity of appealing to the secretary of state. No doubt, a warrant to levy the amount which is in the nature of an execution could not be issued without the parties being heard: *Painter* v. *Liverpool Gas Company*. (1) And though the law does not allow that a person should be deprived of any part of his property without being first heard, yet, if the legislature has either expressly or impliedly given justices authority to act without first summoning the party, an order would be valid: *Bonaker* v. *Evans*. (2) In this case there is such an implied authority. The justices have followed the exact words of the section, and they are justified in making the order.

(1) 3 A. & E. 433. (2) 16 Q. B. 162; 20 L. J. (Q.B.) 137.

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Holker, Q.C., and *Beresford*, in support of the rule. The question is whether the proceedings of the justices are judicial or ministerial. If judicial, the justices ought to have given the defendants an opportunity of being heard before they made the order upon them for payment of the expenses of the constable. It is clear law that, in a judicial proceeding, no man can be deprived of his property without being heard: *Capel* v. *Child* (1); *In re Hammersmith Rent Charge* (2); *Bonaker* v. *Evans* (3), where all the authorities are collected. There are no words in either the statute of 1 & 2 Wm. 4, c. 41 or 1 & 2 Vict. c. 80, which deprive the defendants of this right. The justices have to do more than hear three credible witnesses on their oath; they have to inquire whether the appointment of the constable has been occasioned by the behaviour of the persons employed on the defendants' works. The justices in investigating the matter are not confined to the evidence of three witnesses. The issuing of the warrant in default of payment would be a judicial and not a ministerial act, and before the justices issue their warrant they must summon the party and hear what he has to say in his defence: *Rex* v. *Benn* (4); *Harper* v. *Carr* (5); and so the ordering the payment of a sum of money is a judicial proceeding which cannot take place ex parte. It is argued that there is an appeal to the secretary of state; the language of s. 2 is obscure, if it were the intention of the legislature to allow of an appeal it would have said so more explicitly.

[They were then stopped.]

BLACKBURN, J. I think that the order directing the company to pay the expenses of the constable ought to be quashed, on the ground that the company should have had an opportunity of being heard before the justices. The general rule of law is not disputed; it is laid down in *Bonaker* v. *Evans* (3) in a judgment of Parke, B., delivered in the Court of Exchequer Chamber; he had previously laid down the same rule in *In re Hammersmith Rent Charge*. (2) The general rule is, that every man before a decision is given against him in a judicial proceeding is entitled to be

(1) 2 C. & J. 558.
(2) 4 Ex. 87; 19 L. J. (Ex.) 66.
(3) 16 Q. B. 162; 20 L. J. (Q.B.) 137.
(4) 6 T. R. 198.
(5) 7 T. R. 270.

heard, although the legislature may by enactment (not necessarily by express words, if their intention can be otherwise clearly gathered) authorize a proceeding ex parte. This, however, cannot be presumed. This rule does not apply when the process is merely to bring a person before the Court, as in the case of a bill of indictment preferred before the grand jury, or an order of a judge to hold a party to bail; in those cases he may be proceeded against ex parte. But in the case of a judicial proceeding, though the decision may be the subject of an appeal, the person proceeded against should have an opportunity of being heard. The strongest case on the point is *Capel* v. *Child*. (1) There the words of the Act of Parliament conferred large powers on the bishop who was to act on his own authority, and if he had knowledge that a cure of souls was neglected he might order the incumbent to appoint a curate. I believe the bishop in that case was right in saying that the cure had been neglected; he had however ordered the incumbent to appoint a curate without having previously summoned the incumbent to hear what he had to say why a curate should not be appointed. The bishop having omitted to summon the incumbent, the Court held that the order was void, and that the bishop could not cast the expenses of the curate upon the incumbent without having first given him an opportunity of being heard.

Now in this case it appears that the constable had been appointed, and the Act provides that if two justices are satisfied on the oath of three or more credible witnesses that the appointment of such special constable has been occasioned by the behaviour or by reasonable apprehension of the behaviour of the persons employed upon any railway within the district, such justices shall make orders upon the treasurer or other officer, who shall have the control of the funds of any company, for the payment of such reasonable allowance for their trouble, loss of time, and expenses to such special constables, and a copy of every such order shall be sent by the justices to one of Her Majesty's principal secretaries of state; and such order, if allowed by the secretary of state, shall be binding on such company, and on every such treasurer and officer. This, therefore, is an order on the company to pay

(1) 2 C. & J. 558.

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money; and primâ facie such an order, according to the general rule, cannot be made unless the parties are first heard. There is nothing in the Act to shew that the legislature had the intention or has expressed the intention to dispense with that preliminary. The fact that three witnesses are required to give their evidence, it is said, implies that the justices are to proceed ex parte, because, if it is a matter to be decided after hearing the parties, it would be unnecessary for the justices to act on the evidence of three witnesses; but it does not follow that the parties are not to be heard. If the effect of the enactment is that the order is merely a process to bring the company before the secretary of state, then there would be nothing to prevent the order being made ex parte. But that is not so. It is said that the order, when allowed by the secretary of state, is to be binding on the company; but there is nothing to shew that there is to be any notice given to the company before it is allowed by the secretary of state, and s. 2 provides that the secretary of state may allow it in whole or in part. Then, lastly, it is provided that if the company do not pay it after three weeks a distress warrant may issue. The section does not in terms say that when the order is made the company shall appeal to the secretary of state, or that the justices shall hear them after they have made the order; if it did it would be contrary to the usual course of things that an order should first be made, and then the party on whom it is made should have to come to set it aside. Generally it would be better, and more convenient, and more just that they should have previous notice given to them, that they might be heard before the order is made. I cannot, therefore, think that this order is merely a summons ex parte in effect to bring the party before the secretary of state to shew cause why the order should not be allowed. I think that the justices ought to have given notice to the parties on whom they make the order before they do so. When the company have been heard, if the justices, notwithstanding, decide against them, then they would know that the order would be sent to the secretary of state, and they can be further heard before the secretary of state. If it were not so there would be a hardship on the company, and it would be contrary to the general rule of law and a long current of authorities. I think, therefore, that the order

must be quashed, and, a month having elapsed, I fear it is too late to make a fresh order. I think, however, before the justices make another order, they must give notice to the company, and give them an opportunity of being heard.

QUAIN, J. I am of the same opinion. The general rule on the subject is expressed by Parke, B., in delivering the judgment of the Court of Exchequer Chamber in *Bonaker* v. *Evans*. (1) "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence, by a judicial proceeding, until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary." Therefore we have to find whether this is a judicial proceeding, and if it be, whether the right to be heard before a decision is made against the defendants is taken away, either by express language or by necessary implication. I am of opinion that it is a judicial proceeding, and that there are no sufficient words in the Act to deprive the defendants of their legal right to be heard. Under the first part of the enactment the justices may ex parte appoint a special constable. It is obvious that that is the proper construction, because justices may have to act with promptness. If they had to enter upon an inquiry, and call before them persons who might be supposed to be responsible for the riot or the tumult, or for the payment of the constable, the riot or tumult might take place without the proper officers being appointed. Another question afterwards arises, which was not before the justices on the first occasion, namely, whether the reasonable apprehension of tumult was caused by the behaviour of the persons in the employ of the Cheshire Lines Committee. If the justices believe it has been so occasioned, they are then authorized to make an order upon them to pay the expenses of the special constable. It seems to me, therefore, that that is a judicial inquiry, for it is an inquiry why certain people should not be compelled to pay money, and if they do not pay a warrant of distress may issue against them. It seems to me that that is a judicial proceeding to which the general rule of law applies; and it does not follow, because

(1) 16 Q. B. at p. 171; 20 L. J. (Q.B.) at p. 143.

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there may be an appeal to the secretary of state, that the defendants are not entitled to be heard in proceedings before the justices as well as before the secretary of state. It is a judicial proceeding before the justices, in which the question is, whether the tumult or reasonable apprehension of a tumult is occasioned by the conduct of persons in the employ of the company. I see no words in the Act of Parliament to take the ordinary right away. It would require very strong words indeed to give the right to make the order without giving the opportunity to the company to be heard. I see nothing in the Act of Parliament which either expressly or impliedly takes away that which all the decisions shew they must have, viz., notice, before any such order can be made. Therefore I agree with my Brother Blackburn that this order ought to be quashed.

Rule absolute.

Attorney for prosecution: *John Philpot.*
Attorneys for defendants: *Cunliffe & Beaumont.*

May 31.

BROOKE, APPELLANT; SHADGATE, RESPONDENT.

Weights and Measures—22 & 23 *Vict. c.* 56, *s.* 3—*Light and unjust Weights.*

By s. 3 of 22 & 23 Vict. c. 56, it shall be lawful for every inspector of weights and measures, at all reasonable times, to inspect all beams, scales and balances, and weights and measures in the possession of any person selling, offering, or exposing for sale any goods on any ground or in any public streets . . . ; and if upon such inspection any such beams, scales or balances, or weights and measures shall be found light or unjust, or otherwise contrary to the provisions of this Act and 5 & 6 Wm. 4, c. 63, or if any fraud be wilfully committed in the using thereof, the same shall be liable to be seized and forfeited, and the person using or having the same subject to a penalty.

The appellant had in his possession a spring balance which on inspection was found to be incorrect and unjust, inasmuch as it gave seventeen ounces to the pound weight avoirdupois, being one ounce against the seller, and he was convicted on the ground that the balance could have been used for the purpose of buying as well as selling:—

Held, that the above section was intended to protect the public against persons selling, and did not apply to the case of a seller using a balance unjust to himself, and that therefore the conviction was wrong.

CASE stated by Justices of Kent, under 20 & 21 Vict. c. 43.

An information was preferred, under s. 3 of 22 & 23 Vict.

c. 56 (1), by the respondent, an inspector of weights and measures, against the appellant, charging that the respondent, on the 7th of September, 1872, at the parish of East Farleigh, inspected certain beams, scales, and balances, and weights in the possession of the appellant, who was selling, offering, and exposing for sale certain goods, to wit, pork, bacon and cheese, in a certain public thoroughfare there, and that upon such inspection and examination he found that the appellant then and there had in his possession a certain weighing machine, to wit a spring balance, which was incorrect and unjust.

Upon the hearing it was proved, on the part of the respondent, that on the 7th of September, 1872, he found the appellant with a horse and cart on the highway, in the parish of East Farleigh, within his jurisdiction. The cart was laden with pork, bacon, and cheese which the appellant was selling, offering, and exposing for sale on the highway. The respondent then proceeded to examine a weighing machine called a spring balance, which the appellant had in his possession, and which was being used by him for the purpose of weighing, or selling the before-mentioned articles of food; and on its being tested, the respondent found that the spring balance was incorrect and unjust, inasmuch as it gave seventeen ounces to the pound weight avoirdupois, being an ounce against the seller and in favour of the purchaser; and upon ascertaining this fact, he at once seized the spring balance.

On the part of the appellant it was contended that the statute, being intended for the protection of the public, could apply only to cases in which the balance was in favour of the party using it, and could not apply to cases where the only result of using the

(1) 22 & 23 Vict. c. 56, s. 3: It shall be lawful for every inspector of weights and measures, or other person or persons duly appointed to inspect weights and measures, at all reasonable times to inspect all beams, scales and balances, and weights and measures in the possession of any person selling, offering, or exposing for sale any goods on any open ground or in any public street, lane, thoroughfare, or other open place; and if upon such inspection or examination any such beams, scales or balances, or weights or measures shall be found light or unjust, or otherwise contrary to the provisions of this Act or the hereinbefore recited Act (5 & 6 Wm. 4, c. 63), or if any fraud be wilfully committed in the using thereof, the same shall be liable to be seized and forfeited, and the person or persons using or having in his or her possession any such false or unjust beams, scales or balances, or light or unjust weights or measures, shall be liable to any penalty not exceeding five pounds.

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balance on a sale was a benefit to the purchaser, for whose protection the statute was framed; and that the appellant intended and committed no fraud.

The justices, finding that the balance could have been used for the purpose of buying as well as selling, and whilst it was in the possession of a person trading under the circumstances stated was in fact incorrect and unjust, were of opinion it was liable to be seized, although no fraud on the public was intended to be committed by the appellant; and that the evidence given before them brought the case within the operation of s. 3 of 22 & 23 Vict. c. 56, and the 5 & 6 Wm. 4, c. 63, incorporated therewith, and convicted the appellant.

The question for the opinion of the Court is, whether the spring balance was liable to be seized, and the appellant liable to be convicted.

Gibbons, for the appellant. The justices have negatived fraud, and the appellant cannot be found guilty of committing an offence against himself. Sect. 3 of 22 & 23 Vict. c. 56, only applies to the case of persons selling by unjust weights and measures; the act of which the appellant was guilty is not within the mischief of the enactment. In *Carr* v. *Stringer* (1) the scales, by the removal of an appendage, might at any time be made unjust against the buyer.

The Court then called upon

Barrow, for the respondent. Fraud is not a necessary ingredient to constitute the offence. Here the appellant had in his possession an unjust weight, and was therefore liable to be convicted. It is contrary to the provisions of 5 & 6 Wm. 4, c. 63, that any weighing machines shall be incorrect; and if the 22 & 23 Vict. c. 56, and 5 & 6 Wm. 4, c. 63, are read together, the appellant was rightly convicted. By s. 28 of the Act of Wm. 4, any person who shall have in his possession a steelyard, or other weighing-machine, which shall on examination be found incorrect, or otherwise unjust, is liable to a penalty. These words are large enough to include the present case.

BLACKBURN, J. Sect. 28 of 5 & 6 Wm. 4, c. 63, applies to

(1) Law Rep. 3 Q. B. 433.

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the sale of goods in shops, stores, and warehouses; it has no application to the present case, which is a sale of goods on open ground or in streets. The argument on behalf of the respondent is untenable. The provisions of s. 3 of 22 & 23 Vict. c. 56, are to protect the public against persons selling goods; there is no provision made for the very unusual case of a buyer taking his own weights and measures to weigh goods which he purchases, and, by means of light and unjust weights and measures, cheating the seller. The conviction cannot be upheld.

QUAIN, J. Section 3 clearly only contemplates the case of the seller using light and unjust weights and measures. This case is not within that enactment.

Judgment for the appellant.

Attorney for appellant: *Harris & Finch.*

Attorneys for respondent: *Palmer, Bull, & Fry.*

THE AERATED BREAD COMPANY, LIMITED, APPELLANTS; JAMES GREGG, RESPONDENT.

June 7.

Bread, Sale of, otherwise than by Weight—Bread usually sold as "French or Fancy Bread"—6 & 7 Wm. 4, c. 37, s. 4.

By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same.

The appellants made two kinds of bread, loaves baked in tins, which they called household bread, and which they sold by weight, and bread made in separate loaves, which were put separately in the oven so as to be baked crusty all over, which they called French or fancy bread, and this they did not sell by weight. The justices found, as facts, that the material of which the bread called fancy bread was made in no way differed from the ordinary loaves sold by bakers generally, and except in the manner of baking it in separate loaves it in no way resembled what was called French or fancy bread at the time of the passing of the Act, and was, in fact, only English bread baked so as to have an outside of crust, they were therefore of opinion that the loaves in question were not "French or fancy bread" within the exception of s. 4:—

Held, that the justices had come to a right conclusion on the facts.

CASE stated by justices of Middlesex under 20 & 21 Vict. c. 43.

1. The appellants were convicted under ss. 4 and 7 of 6 & 7

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Wm. 4, c. 37 (1), of selling bread from a van or carriage without having a correct beam and scales with proper weights or other sufficient balance under the following circumstances:

2. The Aerated Bread Company Limited, is incorporated for the manufacture of bread by a new process in which carbonic acid gas is, by pressure, forced into the dough instead of the dough being mixed with a ferment as in the usual method of bread-making. The kneading also is effected by machinery and not by hand.

3. The material of which this bread is made is in all other respects the same as ordinary bread. Two qualities of bread only are manufactured by the company, viz., the best and the seconds, or household bread. The only difference in this respect being, as with other bakers, that the best bread is made of more perfectly sifted flour, and the household bread of flour called "seconds," which is the same flour with less of the bran sifted out.

4. The bread manufactured by the company is not made and baked in batches as by other bakers. The best bread is made in separate loaves, which are separate in the oven so as to be crusty all over. The seconds, or household bread, is baked in tins. The dough for the loaves issues from a spout of a measured size, and the proper quantity for a loaf is cut off by a knife which descends at measured intervals, and the tins, as they are filled, are sent down a slide into the oven. The best bread for the separate loaves is carried to the oven by hand, and in the oven is of course more exposed to evaporation than that inclosed in tins.

5. The company call the loaves baked in tins "seconds, or household bread," and these are sold by the company and their agents by weight; but the best flour loaves, baked separately, and

(1) 6 & 7 Wm. 4, c. 37, s. 4 enacts, "That from and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively by weight, and in case any baker or seller of bread shall sell or cause to be sold bread in any other manner than by weight, then and in any such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding 40s.: provided that nothing in this Act shall prevent or hinder a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same." The limits aforesaid are the city of London and liberties thereof, and beyond the weekly bills of mortality, and ten miles of the Royal Exchange.

not in tins, are not sold by weight, nor are weights and scales sent out with the delivery carts. The company call these "French or fancy bread," and it is under that denomination that they are advertised and sold, and it was contended, that being such they came within the exception of s. 4 of 6 & 7 Wm. 4, c. 37.

6. It was proved that such loaves are in the trade known as French or fancy bread.

7. The justices were of opinion that these loaves were not French or fancy bread within the meaning of the statute, for the reasons following:

I. The material of which the bread in question is made in no way differs from the ordinary loaves sold by bakers generally.

II. The material of these loaves is the same, except in the quality of the flour, with that of the seconds or household bread, which the company sells by weight.

III. The manner of making differs only from that of ordinary bread in that the gas is pressed into the pores of the dough by force instead of being produced in the substance of the dough by a ferment.

IV. That this bread in no way, except the manner of baking in separate loaves, resembles what was called French or fancy bread at the time of the passing of the Act, and is, in fact, only English bread baked so as to have an outside of crust.

V. That no advantage accrues to the consumer from this form of baking, but that it is necessary to the proper baking of the best bread made by the company's process.

VI. That the tin-baked loaf is more troublesome than baking loaves in batches, as is the manner with loaves of ordinary bakers, nevertheless the company treat these tin-baked loaves as ordinary and not as fancy bread, and always sell them by weight.

VII. That the loaves in question do not differ from ordinary loaves more than do the tin-baked loaves, except as above appears.

VIII. That if the loaves in question are fancy bread the tin-baked loaves are equally so, but the company do not claim the tinned loaves as being either French or fancy bread, but sell them by weight.

8. For these reasons the justices were of opinion that the loaves in question were neither "French nor fancy bread," nor

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within the exception in the statute, and convicted the appellant in a single penalty.

9. The question for the opinion of the Court was whether the loaves were French or fancy bread within the exception in the statute.

Finlay, (*Day, Q.C.* with him), for the appellants. The justices having found that the loaves in question are in the trade known as "French or fancy" bread, the case is within the proviso in s. 4 of 5 & 6 Wm. 4, c. 37, and is governed by *Reg.* v. *Wood*. (1)

John Thompson, for the respondent. The question is, are the justices justified on the facts of the case in coming to the conclusion that this bread in no way, except in the manner of baking in separate loaves, resembles what was called "French or fancy" bread at the time of the passing of the Act. There appears to be no distinction between the loaves baked in tins and the loaves baked separately; the bread baked in tins might just as well be said to be fancy bread as this bread. The conviction is right.

BLACKBURN, J. I think this conviction must be affirmed. The question turns upon the construction of s. 4 of 6 & 7 Wm. 4, c. 37. Before referring to *Reg.* v. *Wood* (1) I will state my views on the statute. At the time the 6 & 7 Wm. 4, c. 37, was passed, in the year 1836, there was household bread, which consisted of ordinary loaves, and which any person when purchasing would expect to get of full weight; and there was bread called "fancy bread," which, according to my recollection of that time, was made of a finer quality of flour, and made in the shape of a roll, and a person in buying bread of that description would not expect to get the weight so accurately as if he were buying a household loaf, the shape of the household loaf and the fancy bread being very different. The legislature then enacted that bread should be sold by weight—that is, all ordinary bread; and then it was provided that nothing should prevent any baker selling bread usually sold under the denomination of fancy bread or rolls without being weighed. My opinion is that that meant such bread as at the time the legislature passed this Act was sold under the denomination of

(1) Law Rep. 4 Q. B. 559.

French or fancy bread, which I think, as a matter of fact, bore this different shape. When a new kind of bread is made—such bread known as Italian bread, and which is made in long pieces, or bread called "crescents"—the question would be whether, though such bread may not be made in the ordinary shape in which fancy bread, French bread, or rolls were made in 1836, it is bread of a like kind. If not, by whatever name it is called, it must be sold by weight. In this view the conviction is right. I do not think a change of name is of importance; but the question is, is this bread of the kind that the legislature meant to exempt from being weighed? That depends upon what was known as fancy bread and rolls at the time the legislature passed the 6 & 7 Wm. 4, c. 37. It is not a question as to what the article is now called, but what it is. The justices have found as a fact that this bread, except as to the manner of baking in separate loaves, does not resemble what was called French or fancy bread at the time of the passing of the Act, and is in fact only English bread baked so as to have an outside crust. That fact is not found so explicitly as I should have wished. I think that bread merely baked so as to have an outside crust is not brought within the article that in 1836 was sold as French or fancy bread, because that description of bread did not at that time depend upon whether it had outside crust all over it or not. The justices have found that this is not the article called French or fancy bread at that time, and consequently rightly convicted the appellants.

Now *Reg.* v. *Wood* (1) has been much pressed upon us. In that case there was a difference of opinion, but the majority of the Court came to a conclusion opposite to that at which I have arrived. My Brother Lush appears to have thought that the reason why French bread was not required to be weighed was because it was an article of luxury; and the case seems to have been put thus,—that what was an article of luxury at the time the Act of Parliament was passed would be considered very inferior bread now, and that the Act must mean that the article of luxury which should not be weighed would vary from time to time, and that that which was an article of luxury to our ancestors would become no article of luxury at all to our descendants. I do not

(1) Law Rep. 4 Q. B. 559.

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think that a right construction to be put on the Act. If the case of *Reg.* v. *Wood* (1) were precisely in point we should have had to consider whether we should dissent from it, and that we should not do without consideration, though I am inclined to think that my Brother Hannen's opinion is the better one. I do not think our judgment in this case is in conflict with the case of *Reg.* v. *Wood* (1), but I may say that I do not agree with the majority of the Court. For these reasons I think the conviction was right and ought to be affirmed.

QUAIN, J. I am of the same opinion. The question is whether a common quartern loaf, because it happens to be baked separately, and is therefore crusty all round, is to be said to be French or fancy bread within the meaning of the proviso in s. 4 of 6 & 7 Wm. 4, c. 37. I am of opinion that it is not, and that Act referred to what was commonly and usually sold as fancy bread at the time the Act passed. By that I mean, not that you can only sell as fancy bread bread of the identical shape that was accustomed to be sold at that time, but that it is to be of the same kind of bread that was usually sold as fancy bread at the time 6 & 7 Wm. 4, c. 37, was passed, although it was not in that shape, and although the altered mode of baking may not have been in existence at that time. I cannot help thinking that a common quartern loaf, because it is baked separately, and not in batches, and thus gets crusty all round, cannot be fairly brought within the meaning of the words "French or fancy bread" as used in the statute. It is not the kind of article that the legislature intended to exempt from being weighed. The bread which it was not necessary for the baker to weigh was evidently of the kind of fancy bread or rolls. The interpretation of the proviso gives the character of bread intended to be excepted. It was bread made in small quantities in small shapes, either long rolls or round rolls. The newly-introduced crescents were intended to be excepted; but it was never intended to except a large quartern loaf merely because it was baked, not in batches, but separately, and so became crusty. For these reasons I am of opinion that the conviction should be affirmed.

(1) Law Rep. 4 Q. B. 559.

ARCHIBALD, J. I am also of opinion that this conviction should be affirmed. I do not think the proviso in the statute was intended to extend to what might be simply called fancy bread. What I think it had reference to was that description of bread which was in use at the time of the passing of the Act, and bread of a like kind, and therefore that it is not possible, by simply altering the form of baking what is in truth household bread, and baking it separately, so as to make it crusty all round, to bring it within the exception. I also think that the proviso would cover bread of a like description, even though not actually known in that precise shape at the time of the passing of this statute. In this case it is found that this bread in no way resembles what is called French or fancy bread; it is not of the same kind. Although I am of opinion that the conviction in this case should be affirmed, and although I agree with my Brother Blackburn in not adopting the reasons given by the majority of the Court in *Reg.* v. *Wood* (1), yet in truth our decision is not in conflict with the decision in that case. We are not in any way overruling that case. We proceed upon a different reasoning. I think, as it is found here, that although this is said to be known in the trade as fancy bread, yet it is also found at the same time that it is not that which was fancy bread at the time of the passing of the Act. I therefore think it does not come within the proviso, and therefore this conviction must be affirmed.

Judgment for the respondent.

Attorneys for appellants: *Wilson, Bristows, & Carpmael.*
Attorney for respondent: *A. Haynes.*

(1) Law Rep. 4 Q. B. 559.

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June 23.

[IN THE EXCHEQUER CHAMBER.]

STEWART AND OTHERS *v.* THE WEST INDIA AND PACIFIC STEAMSHIP COMPANY.

Ship and Shipping—General Average—Loss to Cargo by Water let into Ship to extinguish Fire—Construction of Bill of Lading—"Average, if any, to be adjusted according to British Custom."

Plaintiff shipped bark on board defendants' general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, and a hole was cut in the side of the ship, and her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship seriously damaged. The plaintiff's bark was destroyed by the water poured into the ship.

In an action for general average contribution in respect of the destruction of plaintiff's bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:—

Held (affirming the judgment of the Queen's Bench), that, whether or not the loss was, according to the general law of England, the subject of general average contribution, plaintiff, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract, and he was bound by it, even if different from British law.

ERROR from the judgment of the Court of Queen's Bench, for the defendants on a special case (ante, p. 88).

June 17. *Butt, Q.C.* (*Wilkins* with him), for the plaintiffs.

Milward, Q.C. (*R. G. Williams* with him), for the defendants.

The arguments and authorities cited were the same as in the Court below.

Cur. adv. vult.

June 27. The judgment of the Court (Kelly, C.B., Martin and Cleasby, BB., Brett, Grove, and Denman, JJ.), was delivered by

BRETT, J. If it were necessary in this case to determine whether the destruction of merchandise by water, thrown upon it in the course of throwing water to extinguish a fire which is burning other merchandize in the same ship, is the subject of general average, we should desire further time to consider a question

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which is, no doubt, of great importance, and upon which we know of no direct authority in the law of this country.

But the bill of lading, which in express terms provides that "average, if any, is to be adjusted according to British custom," appears to us to admit of no other construction than that which has been put upon it by the Court of Queen's Bench. The custom or usage prevailing among average staters in England is uniform and invariable, that goods thus damaged or destroyed are not brought into account in an average adjustment. We agree with the Court below, that the phrase "British custom," in this bill of lading was intended to refer, and upon a true construction does refer, to this custom or usage, even if it be different from the British law, a point which in this case we do not determine.

The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Milne, Riddle, & Mellor.*

Attorneys for defendants: *Chester & Urquhart, for Haigh & Co., Liverpool.*

BEST *v.* PEMBROKE.

E. & C. CURTIES, GARNISHEES.

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May 27.

Garnishee Clauses of Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 60 *and* 61—*Judgment Creditors—Order entered of Record*—1 & 2 *Wm.* 4, *c.* 58, *s.* 7.

4 QBD 225

A person who has obtained an order for the costs of an interpleader issue and entered it of record, pursuant to s. 7 of 1 & 2 Wm. 4, c. 58, so as to have the force and effect of a judgment, is not a judgment creditor within the meaning of the garnishee clauses (ss. 60 and 61) of the Common Law Procedure Act, 1854.

RULE attaching all debts owing from E. & S. Curties, the garnishees, to Pembroke, the defendant in an interpleader issue, to answer an order of one of the Masters of this court, dated the 19th of April, 1873, and which order was entered of record, pursuant to 1 & 2 Wm. 4, c. 58, s. 7 (1), and calling upon E. & S.

(1) By 1 & 2 Wm. 4, c. 58, s. 7, "all rules, orders, matters, and decisions to be made and done in pursuance of this Act, except only the affidavits to be

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Curties to shew cause why they should not pay to Best, the plaintiff in the interpleader issue, the debt due from them to Pembroke, or so much of it as would be sufficient to satisfy the sum of 101*l.*

It appeared from the affidavits, that Pembroke had sued E. & S. Curties, and recovered in the action, 180*l.* Pembroke then, under the garnishee clauses of the Common Law Procedure Act, 1854, attached a debt of 180*l.* in the hands of one Pease, which was alleged to be due from Pease to E. & S. Curties. Best, however, also claimed to be entitled to that sum. Pease paid the sum of 180*l.* into court. By an order dated the 29th of January, 1873, Honyman, J., ordered that an issue should be tried in which Best, the claimant, was to be plaintiff, and Pembroke, the judgment creditor, the defendant, and that the question to be tried should be whether the sum of 180*l.* paid into court belonged to the claimant or whether he had any lien or charge thereupon as

filed, may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, and hereditaments; and in case any costs shall not be paid within fifteen days after the notice of the taxation and amount thereof given to the party ordered to pay the same . . . execution may issue for the same by fieri facias . . ."

By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60, "it shall be lawful for any creditor who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him, before a Master of the court. . . ."

By s. 61, "it shall be lawful for a judge upon the ex parte application of such judgment creditor either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee), to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge or a Master of the court, as such judge shall appoint, to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

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against the judgment creditor. At the trial of the issue before Pigott, B., a verdict was found for Best, the claimant. By an order of one of the Masters of the court of the 19th of April, 1873, it was ordered that the sum of 180*l.* should be paid out to Best, the claimant, and that Pembroke should pay the costs of the interpleader order and of the trial of the issue. The costs of the claimant were afterwards taxed at 101*l.*, and the order was duly entered at the judgment office, in pursuance of the provisions of 1 & 2 Wm. 4, c. 58, s. 7, so as to have the force and effect of a judgment. Pembroke had not paid Best any part of the taxed costs, and E. & S. Curties were still indebted to Pembroke in the sum of 180*l.*

Bullen shewed cause. This case cannot be distinguished from *Re Frankland.* (1) There a person who had obtained a rule ordering the payment of costs was held not to be, by force of s. 18 of 1 & 2 Vict. c. 110, a judgment creditor within the meaning of ss. 60 and 61 of the Common Law Procedure Act, 1854. Here the order for costs is obtained under 1 & 2 Wm. 4, c. 58. s. 7, but the same principle applies.

Arthur Charles, in support of the rule. *Re Frankland* (1) is not in point; that case was decided on another and different statute. The present case is not distinguishable from *Hartley* v. *Shemwell.* (2) By s. 7 of 1 & 2 Wm. 4, c. 58, all rules or orders may be entered of record, and when so entered shall have the force and effect of a judgment; except only that they shall not be a charge on any lands, tenements, and hereditaments. The exception shews that an order, when entered of record, for every other purpose has the force of a judgment, and if the costs are not paid within fifteen days, execution is to issue for the same, in the same manner as on a judgment obtained in an action. At the time of the passing of 1 & 2 Wm. 4, c. 58, execution could not be had of debts due from third persons, and the garnishee clauses of the Common Law Procedure Act, 1854, were passed to extend the remedy of judgment creditors, and they create a mode by which debts may be taken in execution. By s. 60, on the application of a judgment creditor, all

(1) Ante, p. 18.

(2) 1 B. & S. 1; 30 L. J. (Q.B.) 223.

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debts owing from third persons may be attached. The plaintiff is a person who has all the rights of a judgment creditor; he could either levy on the goods, or, before the Act for the abolition of imprisonment, arrest the person of his debtor; why is he to be deprived of this additional remedy provided by the Common Law Procedure Act, 1854? The construction put on this last enactment in *Re Frankland* (1) is a very narrow and technical one, and ought not to be extended. *Re Price* (2) is not an authority against the plaintiff; that case only decided that a court of law will leave a court of equity to enforce its own decrees.

[Archibald, J., referred to *Newton* v. *Boodle*. (3)]

BLACKBURN, J. I am of opinion that there is in effect no distinction between a case arising under s. 18 of 1 & 2 Vict. c. 110, and one under s. 7 of 1 & 2 Wm. 4, c. 58. The provision of 1 & 2 Vict. c. 110, includes all decrees and orders of courts of equity, while that of 1 & 2 Wm. 4, c. 58, applies only to orders of common law courts. By 1 & 2 Vict. c. 110, s. 18, all orders of courts of equity, and all rules of the courts of common law, are to have the effect of judgments in the superior courts. By 1 & 2 Wm. 4, c. 58, s. 7, rules of the courts of common law are to have the force and effect of judgments. There is, therefore, substantially no distinction in the language of the two Acts. After these two Acts had been passed the Common Law Procedure Act, 1854, by s. 61, gave new remedies to judgment creditors. It did not enact that debts owing to the judgment debtor should be taken in execution by writs of fi. fa., but the legislature thought fit to give the judgment creditor a power to attach debts due to the judgment debtor for the purpose of satisfying his judgment. We have held in *Re Frankland* (1), following *Re Price* (2), that a creditor who had obtained an order for the payment of costs, and which, under 1 & 2 Vict. c. 110, had the effect of a judgment, did not become a judgment creditor within the meaning of s. 61, so as to be entitled to attach a debt due from a garnishee. This may be a narrow construction of these enactments, but I think the decision in *Re Frankland* (1) is correct; it is a recent decision, and we ought to

(1) Ante, p. 18. (2) Law Rep. 4 C. P. 155.
(3) 6 C. B. 532; 18 L. J. (C. P.) 73.

adhere to it. There is nothing in the language of 1 & 2 Wm. 4, c. 58, now under consideration, to distinguish the present case from *Re Frankland.* (1) Mr. Charles relied on *Hartley* v. *Shemwell* (2), but I do not think that case is a binding authority; the real point which was there discussed and decided was, that the arrest of the garnishee was no extinguishment of the debt, and that it still remained liable to attachment. We cannot support *Hartley* v. *Shemwell* (2) without overruling *Re Frankland* (1), and that I think we ought not to do.

QUAIN, J. I decide this case exclusively on the authority of *Re Frankland.* (1) I think in effect there is no distinction between the two statutes, and we are bound by that case.

ARCHIBALD, J. I think that this rule ought to be discharged. The matter is concluded by *Re Frankland* (1), and no distinction can be made between s. 18 of 1 & 2 Vict. c. 110, and s. 7 of 1 & 2 Wm. 4, c. 58. When we look at s. 60 of the Common Law Procedure Act, 1854, we find the words are "any creditor who has obtained a judgment in any of the superior courts;" unless, therefore, a person who has obtained an order for the payment of money has obtained a judgment, that section does not apply. I think that *Re Frankland* (1) contains a sound view of the law.

Rule discharged.

Attorneys for plaintiff: *Pattison, Wigg, & Co.*
Attorney for garnishees: *C. P. Greenhill.*

(1) Ante, p. 18.

(2) 1 B. & S. 1; 30 L. J. (Q.B.) 223.

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June 3.

THOMAS *v.* SYLVESTER AND OTHERS.

Action—Debt—Rent-charge in Fee—Real Action—3 & 4 *Wm.* 4, *c.* 27, *s.* 36.

Since the abolition of real actions by 3 & 4 Wm. 4, c. 27, s. 36, an action of debt will lie for the recovery of a rent-charge in fee.

Declaration, that the plaintiff, being seised in fee of certain messuages, granted them by indenture to C., subject to the payment to the plaintiff, his heirs and assigns, of a rent-charge, and C. covenanted to pay the rent-charge; that afterwards all the estate of C. vested in the defendant, who did not pay the rent-charge:—

Held, on demurrer, that the declaration was good: for that the reason why an action of debt would not formerly lie for a rent-charge in fee was, that there was a higher remedy by real action; but that higher remedy having been abolished by 3 & 4 Wm. 4, c. 27, s. 36, the present remedy by action of debt was maintainable.

DECLARATION: That the plaintiff, being seised in fee of certain messuages and hereditaments situate, &c., by indenture bearing date the 15th of January, 1870, made by and between the plaintiff of the one part, and one David Cotter of the other part, granted and conveyed the messuages and hereditaments (subject to and charged and chargeable with the payment for ever to the plaintiff, his heirs and assigns, of a certain yearly rent-charge of 2*l.* 8*s.* 6*d.* payable out of each of the said messuages and hereditaments on the 24th of June and the 21st of December in each year), unto and to the use of Cotter, his heirs and assigns; and Cotter in the indenture covenanted for himself, his heirs, executors, and administrators, that he, his heirs, executors, administrators, or assigns, would pay unto the plaintiff, his heirs or assigns, the yearly rent-charge on the days aforesaid. That afterwards all the estate of Cotter in the premises became vested in the defendants; and while the estate was so vested in the defendants, to wit, on the 24th of June, 1871, the rent-charge accrued due and became and was payable from the defendants to the plaintiff; yet the defendants did not pay the same, and the same remains wholly due and unpaid.

Demurrer and joinder in demurrer.

H. T. Cole, Q.C., in support of the demurrer, argued that the

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covenant was personal, and did not run with the land. It is unnecessary to state the argument on this point owing to the view the Court took of the case.

C. Bowen, contrà. The question is, whether an action of debt will lie for a rent-charge in fee created by deed. The point was raised, but not decided in *Varley* v. *Leigh*. (1) In that case the defendant was the grantee of a piece of land charged with the payment of a chief rent to the overseers of the poor; the conveyance was made pursuant to certain Acts of Parliament, and contained a covenant by the defendant to pay the chief rent. The Court of Exchequer gave judgment for the plaintiff in an action of debt, on the ground that the defendant was bound by his covenant to pay the chief rent; it was further argued that debt lay, inasmuch as 3 & 4 Wm. 4, c. 27, s. 36, had abolished real actions, and Pollock, C.B., said, "I should be prepared to adopt, if necessary, the reason that, now there is no remedy by action real for the recovery of a rent in fee, there ought to be a remedy by action of debt." Rolfe, B., did not assent to this; but Erle, C.J., in *Dodds* v. *Thompson* (2) appears to have held the same view as Pollock, C.B. Formerly the law would not suffer a real injury to be remedied by an action that was merely personal: 3 Bl. Com. 232. In *Webb* v. *Jiggs* (3) it was admitted that at common law an action of debt would not lie for a rent or annuity in fee, in tail, or for life while it continued a freehold interest: for this, Com. Dig. Debt (A. 6, 7), id. (B.) and 1 Rol. Abr. 594, G., pl. 1, were cited. To recover a freehold rent a person entitled thereto must have availed himself of his real action; but when the freehold ceased to exist, for instance, where a life estate terminated, any arrears might be recovered by an action of debt. Thus "a man makes a lease for life rendering rent; the rent is arrear; the lessor dies; the executors during the life of the tenant for life shall not have an action of debt, but after the estate for life determined the action shall be maintainable": *Ognel's Case*. (4) This proposition is supported by *Sharp's Case* cited in *Ognel's Case*. (5) The facts in that case were, that a rent-charge was

(1) 2 Ex. 446; 17 L. J. (Ex.) 289.
(2) Law Rep. 1 C. P., at p. 137.
(3) 4 M. & S. 113.
(4) 4 Co. Rep. 49 b.
(5) 4 Co. Rep., at p. 51 a.

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granted by deed to a feme sole for life; the rent was arrear; the woman took Sharp to husband; the rent was again arrear; the wife died. Sharp brought an action of debt against the defendant heir of the grantor (tenant of the land charged) for all the arrearages as well before as after marriage, and it was resolved that for the arrearages incurred before the marriage the husband had no remedy by the common law; but for the arrears incurred during the marriage he might have an action of debt at the common law. These authorities shew that where the remedy by real action was no longer enforceable, that is, when the freehold interest ceased, the personal remedy, that is, an action of debt, was maintainable. By analogy to this rule of the common law, now that real actions are abolished, an action of debt is maintainable even when the freehold interest exists.

[BLACKBURN, J. In *Ognel's Case* (1) a reference is made to Fitzherbert, Natura Brevium, p. 121. In note (d) to that passage *Sir W. Leving's Case* is mentioned, 26 Ed. 3, 64, and given as follows: "A. grants a rent to B. for life out of the manor of C., and afterwards enfeoffs D. of the manor, who takes G. to husband, and then B. dies, and his executors bring debt against G., and adjudged 1. That for all arrears incurred after the coverture debt lies against the husband, or if he were dead against his executors; but—2. For all arrears incurred before the coverture the action shall be brought against the husband and wife. See 10 Hen. 6, 11, 12, accordant."]

H. T. Cole, Q.C., in reply. In *Sir W. Leving's Case* and also in *Ognel's Case* (2), and in the other cases cited in that case, the freehold estate had ceased to exist; in the present case the freehold estate is not destroyed. Debt will not lie for a rent-charge in fee; if there is any remedy at all against the assignee of the grantor it is by distress.

BLACKBURN, J. I think the only question which it is necessary to decide is, whether the plaintiff, the grantee of the rent-charge, is entitled to compel the terre-tenants to pay it by a personal action. I may remark that the indenture may be regarded as containing a grant in fee of a rent-charge under the Statute of Uses,

(1) 4 Co. Rep. at p. 51 a. See post, p. 372, n. (1). (2) 4 Co. Rep. 48, b.

and that a rent having been duly created, debt will lie. Under the old law the remedy to recover a freehold rent was by real action, and as long as the freehold continued debt could not be maintained; but when the freehold estate came to an end, then, inasmuch as a real action could no longer be brought, debt would lie at the suit of the person entitled to the rent-charge. Thus where a rent was granted for life the only remedy was by real action, but when the life had dropped debt was maintainable. *Leving's Case*, cited in a note to Fitzherbert, Natura Brevium, p. 121, is a distinct authority that where a rent-charge for life had been created, issuing out of a manor which was afterwards conveyed to an assignee, and the rent-charge became in arrear, an action of debt would lie against the assignee of the manor upon the expiration of the life estate, when, according to the old law, a real action could no longer be brought to recover the arrears. *Leving's Case* is important, as shewing that the action of debt is maintainable against an assignee, and it is precisely in point in the present case, where the plaintiff seeks to recover the rent-charge against the assignees of the land. If the present case had occurred before the passing of 3 & 4 Wm. 4, c. 27, the rent-charge being in fee, the plaintiff would have been driven to a real action to recover it. But the legislature having by that Act abolished real actions, we have to consider the question, whether we must not apply the principle of the common law to the present case. The principle was, that, when the estate for life had terminated, an action of debt for arrearages would lie. It seems to me to follow, upon a similar principle, that when the real action has been abolished the grantee of a rent-charge in fee may maintain an action of debt against the terre-tenant; and this was the opinion of Pollock, C.B., in *Varley* v. *Leigh* (1), though that opinion was not necessary to the decision, and Rolfe, B., did not concur. The authorities brought before us, however, were not cited. I think that real actions being now abolished, debt will lie; and that the authorities shew that it will lie against the assignee of the land as well as against the original grantor.

This is not a question of a covenant running with the land, but

(1) 2 Ex. 446; 17 L. J. (Ex.) 239.

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whether, where there is a rent in fee issuing out of land, the owner of the rent may not sue the terre-tenant in debt, although the terre-tenant was not the original grantor. It seems to me that, according to authority, reason, and justice, he may maintain the action.

QUAIN, J. I am of the same opinion. The distinction in the old books appears to be this: If a rent were granted for years debt would lie, but if it were granted in tail, or for life, debt would not lie for arrears until after the freehold had determined; but when the freehold had determined then debt would lie, and the reason assigned was that the freehold remedy must be pursued, because the law did not suffer a real injury to be remedied by an action merely personal. Putting aside the remedy by real action, would debt have lain against an assignee who is in possession of the same estate in the land as the grantor of the rent? That appears to be decided in *Sir W. Loringe's Case*, cited in *Ognel's Case* (1) thus: "A man was grantee for life of a rent out of a moiety of a manor, of which moiety a man was seised in right of his wife; the rent was in arrear when the grantee died, and the executors brought an action of debt against the husband only for the arrears. It was resolved: 1. That by the death of the grantee for life, the grant for life was turned into nature of debt. 2. Forasmuch as the husband took the profits of the land charged with the rent when it was arrear, he only, without his wife, should be charged with an action of debt." The action was against the person who is called the pernor of the land, provided he had the same estate as the grantor. I apprehend that the reason is that the land is the debtor, as is stated by Wilson, J., in *Mills* v. *Auriol.* (2) If a man comes into possession of land as tenant in fee, he is the pernor of the profits of the land, and was liable to a real action for the non-payment of a rent-charge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie.

(1) 4 Co. Rep. at f. 49 b. This is the case cited by Hale in his note to Fitzherbert as *Leving's Case*: see ante, p. 370. It is reported in 26 Ed. 3, T. T. pl. 5, fol. 64; fol. 10 of Maynard's edition of the Year Books, which differs here in the paging from the older editions.

(2) 1 H. Bl. at p. 445.

I agree it is not necessary to go into the question whether the covenant runs with the land.

ARCHIBALD, J. I also agree in thinking there is no necessity to consider the question in what cases covenants run with the land. It seems to me to be a question of remedy. When we enter into the reasons why debt would not lie for the recovery of the arrears of a freehold rent-charge, it is clear that there was no oversight in abolishing real actions without providing for cases of this kind. The reason why debt did not lie was that the law did not suffer the right injured to be amended by an action merely personal. It is clear from *Leving's Case* (1) that where no real action could be brought debt would lie; and inasmuch as the abolishing of real actions has removed that remedy, I quite agree with my Brothers Blackburn and Quain that in the present case the action of debt is maintainable, and therefore our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Woollacott & Leonard.*
Attorneys for defendants: *Rickards & Walker.*

(2) Fitzherbert, Natura Brevium, 121, note (d).

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CROUCH *v.* THE CREDIT FONCIER OF ENGLAND, LIMITED.

Negotiable Instrument—Debenture payable to Bearer—Promissory Note—Custom.

In May, 1869, the defendants, a limited company registered under the Act of 1862, sold to M. a document under the seal of the company and signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded, "The company hereby promise, subject to the conditions indorsed on this debenture, to pay to the bearer 100*l.* on the 1st of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions, and interest at 8 per cent. on the 1st of November and the 1st of May in each year; and also a further sum of 10*l.* by way of interest or bonus at the same time as the principal sum is paid off. In witness whereof the common seal of the company has been affixed this 9th of May, 1869." By the conditions indorsed a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest, and any bond drawn was to be advertised and paid off with the interest and bonus due, the bond being given up and no further interest being payable.

In July, 1869, the bond was stolen from M. In October, 1871, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who had since absconded. The defendants, having notice of the robbery, refused to pay the debenture to the plaintiff, and he brought an action in his own name, alleging that he was lawful bearer of the debenture.

At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief; but the jury found that the plaintiff had given value for the debenture without notice:—

Held, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. And the plaintiff, therefore, could not recover.

Quære, whether an instrument under the seal of a corporation can be a promissory note.

DECLARATION, that the defendants made their debenture in the words and figures following:

"No. B. 499.

"The Credit Foncier of England, Limited, incorporated under the Companies Act, 1862.

"100*l.* Debenture. 100*l.*

"The Credit Foncier of England, Limited, hereby promise (sub-

ject to the conditions indorsed on this debenture) to pay to the bearer the sum of 100*l.* on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions indorsed hereon, such payment to be made at Messrs. Smith, Payne, & Smiths, bankers, No. 1, Lombard Street, London.

"And, subject to the said indorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer interest at the rate of 8 per cent. per annum upon the said sum of one hundred pounds hereby secured, by equal half-yearly payments on the 1st day of November and the 1st day of May in each year, according to the coupons hereto annexed, the first of such half-yearly payments to be made on the 1st day of November, 1869, and to be continued half-yearly up to the 1st day of May, 1872, unless this debenture shall be entitled to be paid off or redeemed upon any earlier day than the 1st day of May, 1872, in which case the payment of such interest shall be made up to such earlier day only.

"And, subject to the said indorsed conditions, the Credit Foncier of England, Limited, hereby further promise to pay to the bearer, as and by way of additional interest or bonus upon the said principal sum of 100*l.* hereby secured the further sum of ten pounds, such payment to be made at the same time and place as the said principal sum of one hundred pounds shall become payable, according to the tenor of this bond and the conditions hereon indorsed.

"In witness whereof the common seal of the Credit Foncier of England, Limited, has been affixed this 19th day of May, 1869.

"Henry J. Backer, "Financial Secretary. L.S. Directors: G. N. Alfain, A. T. Cunningham."

[Conditions printed on the back :]

"Conditions upon which this debenture is issued.

"1. This debenture is one of the Series B. of debentures of 100*l.* each, numbered 81 to 1140 inclusive, issued by the Credit Foncier of England, Limited.

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"2. The debentures of the several series amount together to 200,000*l.*, viz., Series A., 80 debentures of 500*l.*; B., 1060 of 100*l.*; C., 740 of 50*l.*; D., 380 of 20*l.*; and E., 690 of 10*l.*

"3. The debentures will be paid off or redeemed according to the following table: viz., 40,000*l.* on the 1st of May and the 1st of November, 1870, and on the 1st of May, 1872.

"4. A proportionate number of the debentures of each series will be drawn for redemption at each periodical drawing.

"5. The directors of the Credit Foncier of England, Limited, however, reserve to themselves the right to pay off the whole of the debentures at any earlier period than those specified above, on giving thirty days notice by advertisement in a London daily newspaper of their intention so to do. Should such right be exercised, both the amount of interest then accrued and a bonus equal to 10*l.* per cent. on the amount of the debenture by way of additional interest will be paid at the same time.

"6. The particular debentures to be paid off on each occasion will be determined in the following manner: (*a.*) The drawings will take place half-yearly at the office of the Credit Foncier of England, Limited, St. Clement's House, in the city of London, or other the head office of that company for the time being, in the presence of a notary public of the city of London, at least twenty-one days before the respective half-yearly days on which the debentures are to be paid off or redeemed. (*b.*) Public notice of such drawing will be given by the company at least ten days previously, by advertisement in a London daily newspaper. (*c.*) Forthwith, after each drawing, notice will be given by advertisement in a London daily newspaper of the numbers and amounts of the debentures drawn to be paid off on the next half-yearly day for redemption.

"7. All the debentures not previously drawn will become payable on the 1st day of May, 1872.

"8. Every debenture is entitled to interest on the principal sum at the rate of 8 per cent. per annum, payable on the 1st day of November and the 1st day of May, the first of such payments to be made on the 1st day of November, 1869, and to be continued until the 1st day of May, 1872, unless in the meantime the deben-

ture shall become entitled to be paid off or redeemed; and in that case interest shall only be paid up to the day on which the debenture is entitled to be so paid off. At the time of payment of any coupon for interest, such coupon is to be delivered up to the company.

"9. Every debenture, as it becomes payable, will be paid to the bearer, together with a bonus by way of additional interest, equal to 10 per cent. upon the amount of the debenture, at Messrs. Smith, Payne, & Smiths, No. 1, Lombard Street, London; but the person presenting it will be required to surrender it up at the time of payment, together with all coupons for future interest thereon, as hereafter mentioned.

"10. When any debenture is drawn or advertised to be paid off or redeemed, the coupons annexed to it, purporting to be for interest accruing due after the day on which the debenture is entitled to be paid off or redeemed, become null, and must be delivered up to the company at the same time as the debenture itself."

The declaration then stated that the plaintiff became the lawful bearer of the debenture, and that all conditions, &c., had happened to entitle him to a performance of the promises of the defendants and to the payment of the 100*l.*, &c., with the interest, &c. Breach, non-payment.

The material plea was that the plaintiff was not the lawful bearer of the debenture, as alleged. Issue joined.

At the trial before Bramwell, B., at the Summer Assizes, 1872, at Maidstone, a verdict was found for the plaintiff, leave being reserved to move to enter the verdict for the defendants.

The facts proved, and the course of the trial, are fully given in the judgment of the Court.

A rule was obtained pursuant to the leave reserved to enter a verdict for the defendants, on the grounds, first, that the instrument declared upon was not negotiable or one where the holder could acquire a better title than his transferors; secondly, that the instrument, having been drawn for payment, was overdue, and imputed notice to every subsequent taker.

May 6. *Garth, Q.C.*, and *F. Turner*, shewed cause.

Philbrick, in support of the rule.

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The arguments, on the points on which the judgment proceeded, sufficiently appear from the judgment of the Court. (1)

In addition to the cases noticed in the judgment, the following were referred to in the course of the argument: *Horton* v. *Westminster Improvement Commissioners* (2); *Lang* v. *Smyth* (3); *Colehan* v. *Cooke* (4); *Halford* v. *Cameron's Ry. Co.* (5); *Burbridge* v. *Manners* (6); *Carlon* v. *Kenealy.* (7)

Cur. adv. vult.

July 5. The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

BLACKBURN, J. This was an action brought by the plaintiff in his own name as holder of an instrument called a debenture, against the Credit Foncier, a company incorporated under the Companies Act, 1862. It was defended in the name of the defendants by one Macken, to whom the defendants had originally issued the debenture, and who had indemnified the defendants.

The instrument was under the seal of the company, countersigned by two directors and the secretary. The form of the instrument, as far as it is material to the points we have to decide, is as follows.

It is headed with the name of the company, "The Credit Foncier of England, Limited, incorporated under the Companies Act, 1862." It is called a debenture, and is numbered B. 499. It then proceeds:

"The Credit Foncier of England hereby promise, subject to the

(1) The debenture had an impressed stamp, marked simply "Two shillings sixpence;" and in answer to an objection that this was not a promissory note stamp, counsel for the plaintiff observed that the stamp was of sufficient value, and, the stamp not being specially appropriated, the objection was obviated by s. 10 of 55 Geo. 3, c. 184. As to the document being under seal, counsel for the plaintiff called attention to it being also signed by the directors; and they contended that, the company being registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), the Amendment Act of 1867 (30 & 31 Vict. c. 131), s. 37, applied, and by subs. 2 the signature of the directors made the document a promissory note, binding on the company.

(2) 7 Ex. 780; 21 L. J. (Ex.) 297.
(3) 7 Bing. 284.
(4) Willes, 393, 396.
(5) 16 Q. B. 442; 20 L. J. (Q.B.) 160.
(6) 3 Camp. 193, 194.
(7) 12 M. & W. 139.

conditions indorsed on this debenture, to pay to the bearer the sum of one hundred pounds on the 1st day of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off or redeemed, according to the said printed conditions indorsed hereon, such payment to be made at Messrs. Smith, Payne, & Smiths, bankers, No. 1, Lombard Street." (Then follow some stipulations as to interest and bonus, which we need not notice.) "In witness whereof the common seal of the Credit Foncier of England, Limited, has been affixed this nineteenth day of May, 1869.

"Henry J. Backer, "Financial Secretary. (L.S.) "Directors: G. N. Alfain. "A. T. Cunningham."

The conditions printed on the back, as far as material to notice, are as follows: [The learned judge read shortly the substance of the conditions from the original debenture.]

On the trial before my Brother Bramwell it appeared that in May, 1869, the defendants sold ten debentures for 100*l.* each, all in the same form, to Macken. They were numbered respectively B. 489, 490, 491, 492, 493, 494, 497, 498, 499, and 500. The instrument sued upon, as already mentioned, was that numbered B. 499.

Macken never parted with these debentures. In July, 1869, his house was broken into, and the ten debentures were stolen. Macken gave immediate notice to the defendants; and they, on his indemnity, agreed to stop the payment of the stolen debentures, and gave him other debentures, with corresponding numbers, in lieu of those stolen.

In October, 1870, the bond numbered B. 499 was drawn as one of those to be paid off on the 1st of November, 1870, according to the conditions printed on the back of the debenture, and the amount was paid to the holder of the substituted debenture of that number.

In the end of 1871 the plaintiff purchased the debenture sued upon from a person called Stanley, who has since absconded.

The company refused to pay this debenture to the plaintiff. This action was brought, and Macken, in pursuance of his indemnity, defended the action in the name of the company.

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The question left to the jury was, whether the plaintiff gave value for this debenture without notice; the jury found in favour of the plaintiff; and no motion has been made to question that verdict.

The question of law reserved for this Court was, whether the plaintiff could, under such circumstances, maintain this action, it being admitted that the debenture had been stolen, and that the plaintiff derived title from the thief.

No evidence was given at the trial as to whether similar documents are in practice treated as negotiable, nor was any express admission made as to this point; but from my Brother Bramwell's report we think that we must take it to have been tacitly admitted at the trial that they are so treated, and we must in this case assume that this admission is correct. As instruments of this kind have only come into use within the last few years, a custom or usage to treat them as negotiable can only have begun recently; but we must, in deciding this case, proceed on the assumption that they have acquired whatever degree of negotiability can be created by any such recent custom of trade. As we proceed entirely on this admission, it is not to be taken in any future case that any custom was in this case established.

The general rule is not disputed that a chose in action cannot be transferred at law at all, but that in equity it may be assigned, though the action at law must be brought by the assignee in the name of the original contractee, in this case Macken. Equity will compel the contractee, if he has assigned the contract, to allow his name to be used for this purpose on an indemnity against costs. Had Macken assigned this contract to the plaintiff, either directly or through the medium of intervening assignees, the question, whether the plaintiff was able to sue in his own name, or was obliged to sue in the name of Macken, would have been purely technical. But the general rule, both at law and in equity, is that no person can acquire title, either to a chose in action or any other property, from one who has himself no title to it; and therefore the plaintiff could not, in equity, have compelled Macken to permit his name to be used, unless, to borrow the language of Tindall, C.J., in *Brandao* v. *Barnett* (1), such an instrument as this "falls within

(1) 1 M. & G. at p. 935.

that description of property to which a good title may be acquired by a party who takes it bonâ fide for value, notwithstanding any defect of title in the party from whom it is so taken."

In the present case the plaintiff has taken upon himself the burden of establishing both that the property in the debenture passed to him by delivery, and that the right to sue in his own name was transferred to him.

The two propositions are very much connected, but not identical. The holder of an overdue bill or note may confer the right on the transferee to sue in his own name, but he conveys no better title than he had himself. So the assignee of a Scotch bond, which is assignable by the law of Scotland, may sue in his own name in the courts of this country: see *Innes* v. *Dunlop* (1); but he has not a better title than those from whom he took the bond, unless, perhaps, if the contract is by the law of Scotland not merely assignable but also negotiable. As to this, in *Dixon* v. *Bovill* (2), Lord Cranworth, then Lord Chancellor, in delivering the judgment of the House of Lords in a Scotch case as to iron scrip notes, says, "I have no hesitation in saying, that independently of the law merchant and of positive statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title."

But the two questions go very much together; and, indeed, in the notes to *Miller* v. *Race* (3), where all the authorities are collected, the very learned author says: "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a bonâ fide transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i. e., if it be either not accustom-

(1) 8 T. R. 595.
(2) 3 Macq. at p. 16.
(3) 1 Smith L. C. at p. 259, 2nd ed.; at p. 479, 6th ed.

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ably transferable, or, though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however bonâ fide, if the transferor himself have not a good title to it, and the transfer be made out of market overt."

Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a bonâ fide holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it. The first question, therefore, is whether this instrument is a promissory note. It is under seal, and therefore is primâ facie a covenant, not a promise; and it is quite clear that a covenant to pay money is not negotiable by the custom of merchants.

When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange and making the promise implied by law from making a bill, and is liable to be sued in assumpsit on the bill, though a body corporate: see *Murray* v. *East India Co.* (1) This is not by virtue of any statute, but from the common law. But all such bills of exchange in practice always have been made under hand, by an agent authorized to draw or accept as the case may be. The East India Company by their secretary, the Bank of England, as any one who looks at a Bank of England note may see, make their notes by an agent; and there is no case in the books where a bill of exchange made under seal has been sued upon.

The negotiability of promissory notes depends, in part at least, upon the Statute 3 & 4 Anne, c. 9; and it seems to have been the opinion of Lord Justice Wood, in *Re General Estates Co.* (2), and of Malins, V.C., in *Re Imperial Land Co. of Marseilles* (3), that, inasmuch as that Act enacts that promissory notes in writing

(1) 5 B. & Ald. 204. (2) Law Rep. 3 Ch. at p. 762.
(3) Law Rep. 11 Eq. at p. 490.

"made and signed by any person or persons, *body politic or corporate*, or by the servant or agent of any *corporation*, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, *body politic or corporate*, his, her, or their servant or agent, doth promise to pay any sum of money, shall be indorsable, as bills of exchange are, by the custom of merchants," it follows that a corporation fixing its seal to a written promise to pay must be considered as *signing* the promise, not as covenanting under seal to fulfil it; and so, that the statute by implication enacts that what would at common law be their covenant to pay is their promise to pay. But, although intimating their opinion, neither of the learned persons referred to gave any decision on the point, as it was not necessary for the purpose of the cases before them. In *Slark* v. *Highgate Archway Company* (1) a similar question was raised, but not decided. There, however, the Act authorized the making of notes *under the seal of the corporation*. Neither is it necessary for us to decide the point as, for reasons which will presently be given, the instrument in question, even if under hand, could not be a promissory note; but we wish to point out that in *Glyn* v. *Baker* (2) the form of the East India bond was that the East India Company acknowledged to have received of W. G. Sibley 100*l*., which the company promised to repay to Sibley, his executors, or assigns by indorsement. It was, therefore, in form a promissory note for value received, payable to order, and, had it been signed as such by an agent of the East India Company, would have been negotiable. But it was a bond under the seal of the East India Company, and Le Blanc, J., says: "It is clear that no action could have been brought on this bond but by Sibley the obligee, or in his name; or if he died, in the name of his executors."

The alarm occasioned by this decision was so great that within a month afterwards an Act (51 Geo. 3, c. 64) was passed to make East India Bonds negotiable like promissory notes. It seems not to have occurred to any one that it could be said that this was already done by virtue of the statute of Anne, the promise in writing being signed by the East India Company's seal.

This seems a strong authority for saying that instruments under

(1) 5 Taunt. 792. (2) 13 East, 509, 512, 514.

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the seal of a body corporate are not exceptions from the general rule laid down in Byles on Bills, p. 67, n. 10th ed., that "at common law bills of exchange and promissory notes, being simple contracts, cannot be under seal, at least so as to retain their negotiable qualities." And it certainly is very desirable that it should not be left doubtful on the face of an instrument whether it is a covenant or a promise.

But it is not necessary to decide in the present case whether an instrument under the seal of a corporation can be a promissory note; for the contract of the Credit Foncier is not merely to pay the money, but also to cause a portion of the bonds to be drawn in the stipulated manner; and anyone entitled to sue on the contract contained in this instrument would be entitled to sue for damages, if the company did not fairly give him his chance of having his bond drawn according to the stipulated conditions. And it is obvious that such a contract as that cannot be a promissory note.

It is not pretended that there is any statute applicable to such a class of instruments as the present. We have therefore to see whether it falls within any other principle. Foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government. In *Attorney General* v. *Bouwens* (1) it was found in the special verdict, as to Russian, Danish, and Dutch bonds, that those securities have always been dealt with as transferable within this kingdom by delivery only, that it is not necessary to do any act out of England to render such a transfer valid, and that the bearers of the bonds have always been treated and dealt with by the agents of the three sovereigns as entitled to the money payable under the bonds. The Court in that case held the bonds transferable in England, so as to render the executors of the holder liable to probate duty in respect of them. And the Court of King's Bench in *Gorgier* v. *Mieville* (2) decided that a Prussian bond of a similar description was negotiable. We have no intention to throw the least doubt on this decision; but we do not think it applicable to

(1) 4 M. & W. 171, 180. (2) 3 B. & C. 45.

an English instrument made in England; and we express no opinion as to what might be the law as to obligations made by subjects abroad, which, by the law of the country where they were made, are negotiable in that country. We confine our judgment to the case before us, which is that of an English instrument made by an English company in England.

We think that the form of the instrument shews that the defendants did contract with Macken, to whom they originally issued this instrument, to pay the money to the bearer of this instrument, and (wholly irrespective of any custom) they were competent to make any stipulations they pleased with Macken that would affect their own rights and his only. If Macken had sued them, a plea, that they had paid the money to the bearer without any notice that he was not entitled to it, would be good, if, on the true construction of the instrument it is stipulated that the receipt of the bearer giving up the instrument should be a sufficient discharge for the company; for they were quite competent to stipulate to that effect. And if Macken were suing in his own name for the benefit of an assignee, as in *Higgs* v. *Assam Tea Co.* (1); or if the assignee were proceeding in equity in his own name, as in *In re Blakely Ordnance Co.* (2); *In re Natal Investment Co.* (3); *In re General Estate Co., Ex parte City Bank* (4); and *In re Imperial Land Co. of Marseilles* (5); and the defendants set up some equitable defence, good against the original contractee, and therefore generally good against the assignee also, it would be a good answer to say that the defendants had, with a view to induce persons to become assignees of such instruments, represented that there were no such equities, and that the now holder was induced to take this instrument on the faith of that representation. That would amount to an estoppel at law: *In re Bahia & San Francisco Ry. Co.* (2) And in *In re Blakely Ordnance Co.* (2), it was held that it was a good answer in equity. In *In re Natal Investment Co.* (7) Lord Cairns, C., as we understand him, thought that the mere fact of making an instrument payable to order did not amount to such a representation, but he did not dispute that, if made out, it would

(1) Law Rep. 4 Ex. 387.
(2) Law Rep. 3 Ch. 154.
(3) Law Rep. 3 Ch. 355.
(4) Law Rep. 3 Ch. 758.
(5) Law Rep. 11 Eq. 478.
(6) Law Rep. 3 Q. B. 584; and see *Hart* v. *Frontino &c. Mining Co.*, Law Rep. 5 Ex. 111.
(7) Law Rep. 3 Ch. at p. 358.

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produce the effect contended for, or say that such a provision was beyond the competency of the parties. We have not now to consider whether the form of this debenture is such as to amount to such a representation or not. If it does, the Credit Foncier had full power to alter or abandon their own rights; but the plaintiff is obliged to contend, in this case, that they had also power to alter and abandon the rights of those who might become holders of the instrument, and to declare that such persons should, contrary to the general rule of law, hold their property on a precarious title liable to be divested if a thief or finder could find a bonâ fide purchaser for the debenture. No authority has been cited to shew that it is within the competency of private persons by their contract to attach such an incident to any property.

He is also obliged to contend that they could give a right of action in his own name to any holder, though the general law would give no such right of action to the holders. There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to *Dixon* v. *Bovill* (1), and *Thompson* v. *Dominy* (2) as authorities that he cannot, irrespective of custom, so create it.

We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not we know not) that such a custom has prevailed of late years; but as the instruments themselves are only of recent introduction, it can be no part of the law merchant. Incidents, which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant, which forms part of the law, and of which the Courts take notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away. Thus, in *Edie* v. *East India Co.* (3), there

(1) 3 Macq. 1. (2) 14 M. & W. 403. (3) 2 Burr. 1216.

was a verdict of the jury founded on strong evidence that, according to usage in London, an indorsement to an indorsee by name without any further words was restrictive; but the Court of King's Bench decided that the evidence should not have been admitted, the law merchant being known to the Court to be that it was not restrictive. And in *Partridge* v. *Bank of England* (1) there was the exact converse. There the dividend warrants of the Bank of England were in the form of cheques payable to a particular person, Partridge, without any words to make them transferable, which therefore were by the general law merchant not transferable. The Court of Exchequer Chamber gave judgment non obstante veredicto on a plea on which it had been found that by custom for sixty years such dividend warrants were negotiable.

We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though that transferee took it bonâ fide and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual.

We think, therefore, that the rule to enter a verdict for the defendants ought to be made absolute.

My Brother Bramwell, in reserving the question, provided that there should be no appeal without leave of this Court. We give that leave on two conditions: first, that the plaintiff within a month gives security to the satisfaction of the master for the costs in appeal as well as the costs below; and, secondly, that the plaintiff consents that the Court of Error shall have liberty to disregard the form of the pleas and decide on the real question.

Rule absolute.

Attorney for plaintiff: *Darville.*
Attorney for defendants: *Heritage.*

(1) 9 Q. B. 396; 15 L. J. (Q.B.) 395.

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June 14.

[IN THE EXCHEQUER CHAMBER.]

EVERINGHAM *v.* IVATT AND OTHERS.

Copyhold, Devise of, for a Term of Years with Remainder over—Right of Lord to compel Termor to be admitted.

A copyholder in fee devised his estate to trustees for a term of years and, subject to the term, to A. in fee. A. was admitted and paid a full fine; the admittance on the roll recited the will, and stated that "the lord by his steward delivered to A. seisin of the lands by the rod to hold the same to him and his heirs and assigns for ever according to the purport and effect of the will; and saving the rights of the lord and all other persons, the said A. was admitted tenant thereof in manner aforesaid. And he paid the fine and relief, but because the said A. is an infant the custody as well of his person as of the premises aforesaid is committed to the guardians of the infant." After the admittance of A. the lord made proclamations, and, the trustees refusing to be admitted, he seized quousque:—

Held, affirming the decision of the Court of Queen's Bench, that, as by the form of the admission A. was admitted in præsenti and not merely to the remainder, the lord had both a tenant on the roll and a full fine, and therefore could not force the trustees to come in and be admitted.

ERROR from the judgment of the Court of Queen's Bench, in favour of the defendants, on a special case stated in an action of ejectment after appearance. (1)

1. The plaintiff is lord of the manor of Ramplon Sifles, in the county of Cambridge, and is seised in fee of the manor, and he has been so since the 8th of June, 1853.

2. The property sought to be recovered is situate within and parcel of the manor and customary tenements thereof, held of the manor by copy of court roll.

3. Thomas Ivatt, a customary tenant of the manor, became and was seised of the property in his demesne as of fee at the will of the lord, according to the custom of the manor, and on the 15th of August, 1869, died so seised thereof, and his death was duly presented by the homage at a general court baron and customary court duly holden in and for the manor.

4. Thomas Ivatt was at his death also seised of other real estate, both freehold and copyhold.

5. Thomas Ivatt, by his will and testament duly made, executed,

(1) Law Rep. 7 Q. B. 683.

published, and attested, dated the 21st of December, 1867, appointed his wife Eliza Ivatt (one of the defendants), the Rev. Alfred William Ivatt (since deceased), and William Pate (another of the defendants) executors and trustees thereof; and he thereby, amongst other things, after a bequest of certain legacies, and of annuities to the testator's wife, and to the Rev. Adam Fitch, and Harriet his wife, if she should survive him, with a power of distress in case of non-payment thereof on his real estate, and a charge on his real estate of 2000*l.* after the death of the annuitants, gave and devised all his messuages, lands, tenements, and hereditaments, and real estates (except estates vested in him as trustee or mortgagee) unto his wife and Alfred William Ivatt, since deceased, and William Pate, their executors, administrators, and assigns for the term of 500 years, to be computed from the time of his decease without impeachment of waste, upon trust that the said trustees, or the survivors or survivor of them, should, after the death of the survivor of Adam Fitch and Harriet his wife, by sale or mortgage of the hereditaments, or a competent part thereof, for all or any part of the said term of 500 years, levy and raise the said 2000*l.*, and the interest thereof, and the costs and expenses attending the same, and pay the same when so raised to the persons and at the times therein specified, with a power of investment in case the persons to whom the same were payable were under age at the death of the survivor of the said annuitants. The will then proceeds as follows: "And as to all my messuages, lands, tenements, hereditaments, and real estate (except estates vested in me as trustee or mortgagee) subject to the said annuities and the said sum of 2000*l.* hereinbefore respectively charged thereon, and to the said term of 500 years therein hereinbefore bequeathed and the trusts thereof, and also subject in aid of my personal estate to the payment of my debts and funeral and testamentary expenses, and all the pecuniary legacies hereinbefore bequeathed, or which I may bequeath by any codicil to this my will, and also as to the residue of my personal estate I give, devise, and bequeath the same unto my nephew C. E. Ivatt, another son of the said Alfred William Ivatt, his heirs, executors, administrators, and assigns absolutely, and in case the said C. E. Ivatt shall be under the age of twenty-one years at my decease, I

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direct that my said trustees or trustee shall dispose of, convert, and get in my said residuary personal estate, and invest the clear proceeds arising therefrom after the payment of all incidental expenses in manner hereinbefore mentioned, with such power of varying investments as aforesaid, and shall hold the stocks, funds, shares, or securities in which such clear proceeds shall be so invested, in trust for him the said C. E. Ivatt, his executors, administrators, and assigns; and in case the said C. E. Ivatt shall be under the age of twenty-one years at my decease I also empower my said trustees or trustee, if they, she, or he shall think proper and deem it expedient so to do, to continue and carry on the business of my farm as now carried on by me until the said C. E. Ivatt shall attain the age of twenty-one years, or for any shorter period, and for that purpose to employ and hire such bailiffs, servants, workmen, and others, and to allow such sums of money for their salaries, wages, or hire, and to buy and sell stock, and to do all other acts and things in or connected with the business of a farmer as they, she, or he shall think proper without being responsible for any loss to arise thereby, and also to let or lease the said messuages, lands, tenements, hereditaments, and real estate, or any of them, or any part thereof, from year to year, or for any term of years not exceeding six years, to take effect in possession at the best rent that can be reasonably obtained, and without taking anything in the nature of a fine or premium, and in the event of my said farming business being carried on by my said trustees or trustee as aforesaid, or of any such letting or lease as aforesaid, I direct that the clear profits (if any) arising from such business, and the rents payable under such letting or lease as aforesaid shall be applicable in the same manner as the annual income arising from the investments of my said residuary personal estate." The will further contains a declaration, "that if the said C. E. Ivatt should be under the age of twenty-one years at the decease of the testator, or if any issue of the said Adam Fitch and Harriet his wife, presumptively entitled to the said 2000*l.* should be under that age on the death of the survivor of the said Adam Fitch and Harriet his wife, the trustees or trustee should apply the whole or part of the annual income of the testator's residuary personal estate, or the investments thereof,

or of the said 2000*l.*, towards the maintenance and education of C. E. Ivatt or such issue as aforesaid, and should accumulate the remainder for the benefit of the cestui que trustent under the will.

6. The will has been duly enrolled on the rolls of the manor.

7. The will was duly proved by Eliza Ivatt and William Pate, his sole surviving executors and trustees, on the 11th of October, 1869.

8. The property sought to be recovered forms part of the property given and devised by the will to the trustees.

9. Eliza Ivatt and William Pate have let the whole of the property sought to be recovered, and received the rents thereof, and the other defendants are respectively their tenants.

10. Three proclamations have been duly made at three consecutive courts duly holden in and for the manor for the heir, or heir's devisee or devisees, or other person or persons having any estate, right, title, or interest in or to the property in question, of which Thomas Ivatt died so seised, to come into court and be admitted tenant or tenants thereto.

11. C. E. Ivatt was, on the 24th of November, 1869, being then an infant, admitted tenant to the property devised to him by the will, to hold to him, his heirs and assigns for ever, according to the purport and effect of the will, of the lord of the manor, by the rod at the will of the lord according to the custom of the manor, at certain annual rents, relief, fealty, suit of court, and other customs, dues, suits, and services theretofore due, and of right accustomed, and saving the rights of the lord, and of all other persons, the said C. E. Ivatt was by his attorney admitted tenant thereof, and he paid to the lord his fine and relief as valued by Mr. John Robert Mann, who let the property on behalf of the trustees, amounting to the sum of 882*l.* 10*s.* 6*d.*, with fees amounting to 73*l.* 2*s.* 11*d.*, but his fealty was respited because, &c., and because C. E. Ivatt was an infant under the age of twenty-one years, therefore the custody as well of his person as of his property aforesaid was, on the nomination and at the request of Eliza Ivatt and William Pate, committed to them until, &c. C. E. Ivatt is still an infant, being now of the age of nineteen or thereabouts. In the commencement of the corre-

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spondence the steward insisted that the three termors should be admitted, he having taken counsel's opinion to that effect, and afterwards, in consequence of its being insisted that C. E. Ivatt should be admitted, the steward wrote a letter to the defendant's attorney, dated the 28th of October, 1869, in which he said, "The lord will admit Mr. Charles Edward Ivatt by his guardian. By book-post I send you the draft admission for approval;" and in another letter, dated the 15th of November, 1869, the steward said as follows: "I shall be glad to receive back this draft admission approved by you; you must clearly understand that in admitting the reversioner as required by you the lord does not mean to waive his right to require the termors to take admission, so that he may have a tenant on the roll who can perform suit and service and pay the quit rents," &c.

12. The annuitants under the will, the Rev. Adam Fitch and Harriett his wife, are both still living.

13. The defendants Eliza Ivatt and William Pate have not, nor has either of them, answered to the proclamations or either of them, and have not, nor has either of them, claimed or applied to be or been admitted tenants or tenant to the property or any part of it, and have refused to be so admitted, and no other person or persons has or have answered to the proclamations, or any or either of them, or claimed or applied to be, or been admitted a tenant or tenants to the property, or any part thereof, for the whole or any part of the term of 500 years.

14. For such default the plaintiff, subsequently to the admission of C. E. Ivatt, and before the issuing of the writ of ejectment according to the custom of the manor, in due form of law, seised into his hands and for his use the property until Eliza Ivatt and William Pate, or some person or persons, shall appear and make good his or her claim to be admitted tenants or tenant of the same in respect of the term of 500 years.

15. It is to be taken for all the purposes of this case that all things have been duly done, and have happened, and exist to entitle the plaintiff to make such seizure, and to bring and maintain this action if he is entitled to have tenants or a tenant admitted to the property in respect of the term of 500 years, notwithstanding the admission of C. E. Ivatt.

16. Eliza Ivatt and William Pate are under no disabilities, and cannot now disclaim their estate or trusts under the will.

The question for the opinion of the Court was, whether the plaintiff was or was not entitled to make the seizure quousque after the admission of C. E. Ivatt under the circumstances hereinbefore mentioned, on the ground of no person or persons having been admitted tenants or tenant of the property in respect of the term of 500 years.

Joshua Williams, Q.C. (*J. O. Griffits* with him), for the plaintiff, contended that the admittance of C. E. Ivatt was not an admittance in præsenti, but an admittance to an estate expectant on the determination of a term of 500 years; and though the admittance of a remainderman may be an admittance of the tenant for years—as the two form one estate—yet such constructive admittance of the tenant for years is only for the purpose of vesting the estate in him, and does not bar the lord of his fine, and the lord was entitled to seize quousque the tenants for years came in. He cited *Doe* v. *Jenney* (1); *Earl of Bath* v. *Abney*. (2)

Field, Q.C. (*W. R. Cole* with him), for the defendants, was not heard.

KELLY, C.B. In this case the lord of a manor brings ejectment to recover copyhold land, parcel of the manor, under a claim to seize quousque. The circumstances under which the action is brought appear to be these. A customary tenant in fee, it being now unnecessary to surrender to the use of the will, devised this copyhold land to certain persons for a term of 500 years, to pay certain legacies and certain annuities, and a certain charge of 2000*l.*, and, subject to this term, he devised the land to C. E. Ivatt in fee. The devisee in fee claimed to be admitted and he was admitted by the steward according to the custom of the manor. The question is, whether the admittance of C. E. Ivatt was an admittance as tenant in possession. It is contended that he was not admitted to a fee in possession but merely to an estate expectant on the determination of the term of 500 years. We must

(1) 5 East, 522. (2) 1 Burr. 206.

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first consider what is the nature of the admittance in this case, because if C. E. Ivatt has been admitted, not as a remainderman but as a tenant in fee in possession, it is clear law that the lord, having a tenant on whom the obligation is imposed of paying rents and performing services according to the custom of the manor, cannot seize the land in derogation of his own grant in order to entitle himself to some fine which he alleges is due to him from certain persons entitled to an estate in possession. Now the terms of the admission are these: (1) After reciting the death of T. Ivatt, it states, that "because no person came to be admitted tenant thereto, proclamation was duly made; that C. E. Ivatt, by his attorney, produced the probate of the will of T. Ivatt, and thereupon prayed of the lord of the said manor to be admitted tenant to the hereditaments and premises devised to him by the will of T. Ivatt; to whom the lord of the said manor, by his steward, granted and delivered seisin thereof by the rod to have and to hold the same premises with the appurtenances unto the said C. E. Ivatt, his heirs, and assigns for ever according to the purport and effect of the will." It is contended on the part of the plaintiff, that this is an admittance of C. E. Ivatt to the estate only which, on the face of the will, he takes under the will, and therefore it is an admittance of C. E. Ivatt to the remainder expectant on the determination of the term of 500 years. I think it is unnecessary to enter into the question whether in point of law, if the admittance contained nothing more, these words are merely formal and merely indicate that the lord had notice of the will by its being entered on the court rolls. It may well be that the termors may never claim to be admitted, and it is quite uncertain, at the time admittance is claimed by the devisee in fee, whether the trusts of the term may not have been satisfied, and whether the term itself may not have been surrendered. I am by no means prepared to say that the words I have mentioned are not, in fact, an admittance to an estate in fee in possession, subject to the right of any person who may have a claim to the possession, but when we look at the other part of the admittance I think no question can arise as to its true construction; for it proceeds, "saving the rights of the lord and all other persons the said C. E. Ivatt was admitted tenant in manner

aforesaid, and he paid his fine and relief, but his fealty was respited because," and so forth; "and because the said C. E. Ivatt is an infant the custody as well of his person as of the premises with the appurtenances, is committed to the guardians of the infant until," &c. (1) The plain and obvious meaning of these words is, that the custody of the lands and hereditaments in question, with the appurtenances, was thereby vested in and transferred to the guardians of C. E. Ivatt. These words clearly mean that the land is in their actual possession. Probably, if the tenant had not been an infant, the admittance would, by its terms, have provided that the custody in possession of the land was thereby committed and delivered to the tenant himself. It is unnecessary to determine whether the lord was bound under the circumstances of the case to admit the infant as tenant in fee in possession; but the question does arise whether, he having been admitted as such tenant, the lord can now in derogation of his grant proceed by ejectment, and hold the land until some person entitled under the term of 500 years shall come in. *Garland* v. *Mead* (2) is an authority that where an heir-at-law has tendered himself for admittance the lord cannot seize quousque on the ground that certain devisees are entitled and ought to be admitted, if they do not claim the property. With the authority of this case, on what ground can it be contended that when one claims to be admitted and is not rejected, but accepted, by the lord, he can treat the admittance as a nullity, and alleging that there is no tenant on the roll, take possession of the land until some other person is admitted? But, further, in this case it appears that the lord has accepted such a fine as would be payable on the admittance of a tenant in fee in possession; he cannot, therefore, treat his own act as a nullity. No authority has been cited to shew that a lord may eject a tenant in fee simple who has paid a full fine upon his admittance. I find it laid down in *Blackburne* v. *Graves* (3), "if a fine be assessed for the whole estate, there is an end of the business; but if a fine be assessed only for a particular estate the lord ought to have another." This passage shews that if a fine be assessed for the whole estate the lord is not entitled to any further

(1) See Law Rep. 7 Q. B. at p. 684. (2) Law Rep. 6 Q. B. 441.
(3) 1 Mod. 120.

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fine. If the lord is entitled to a fine he must enforce his claim by action, and he cannot recover the amount of it by a seizure quousque.

It only remains to refer to *Doe* v. *Jenney* (1), cited by Mr. Williams. At first sight it seems to assist his argument, but it is distinguishable on the fact that the remainderman had never been admitted, and that no fine had ever been paid, and also that there was a custom that a tenant in remainder should be admitted and pay a fine. The case, therefore, is not in point for the plaintiff.

I think that as the lord has accepted a full fine and granted seisin, he cannot derogate from his grant, and he cannot seize the land on the ground that he has no tenant. The judgment of the Court of Queen's Bench must be affirmed.

MARTIN, B. I am quite of the same opinion. It is sufficient to say that I have read very carefully the judgment of the Court of Queen's Bench in this case, and it seems to me that no argument addressed to this Court by Mr. Williams in the slightest degree affects it. I believe the rule laid down by Lord Cranworth (2) to be correct, that the testator disposing of a copyhold by his will does no more than name the person whom the lord will admit. It follows from this that the lord can insist only that he shall never be without either a tenant or the possession of the land. This is effectually secured to him by his right of seizing the land quousque upon the death of a tenant unless the heir or some one claiming under the will comes in and is admitted. Assuming this to be the rule, everything which the law requires has been done to satisfy the rights of the lord, and this is a most unreasonable claim. The real interest in this term was in the persons who were interested in the sums charged on the copyhold land. The person who was admitted was the person entitled to the land in fee subject to the charge, and in my opinion he was the only person interested in the land itself, and the fine was assessed at a proper amount upon an admittance in fee simple in possession. It has been argued that the interest of the tenant in fee was by way of remainder, and did not commence until 500 years had

(1) 5 East, 522.

(2) *Glass* v. *Richardson*, 2 D. M. & G. at p. 662.

elapsed after the death of the testator. I think after the admittance by the lord this argument is wholly untenable.

BRETT, J., concurred.

CLEASBY, B. I merely wish to state how we may consider the admittance to be that of a tenant in possession. The case is not like that of a devise to a tenant for life. Although technically this is a remainder, the devise to C. E. Ivatt carries substantially the whole estate. He has the property subject to the charges. I think the correspondence mentioned in paragraph 11 shews that this view was present to the minds of the parties and that it was insisted, as a matter of right, that C. E. Ivatt was entitled to be admitted and pay a fine as tenant in possession. After having admitted him the lord cannot afterwards limit the effect of the admittances when C. E. Ivatt has paid, as tenant in possession, the whole fine due.

GROVE, J. I am of the same opinion. Upon the admission of the remainderman in this case a fine is taken proportionate not merely to the value of his interest but of the fee simple of the land; how can it be said that the lord is entitled to seize for the non-payment of a fine by the particular tenant which has been paid upon the admittance of the remainderman?

DENMAN, J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Remnant & Penley.*

Attorneys for defendants: *Cole, Cole, & Jackson, for Francis, Webster, & Riches, Cambridge.*

Considered. DANISH MERCANTILE CO. LD. v. BEAUMONT [1951] 1 Ch. 680

Observations of BLACKBURN, J., at p. 399, *examined and explained.* DANISH MERCANTILE CO., LTD. *v.* BEAUMONT. [1951] 1 All E.R. 925.

1873
June 17.

REYNOLDS AND ANOTHER *v.* HOWELL.

Practice—Attorney—Action brought without Authority—Staying Proceedings.

Where an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed without payment of costs.

RULE calling upon the defendant to shew cause why all proceedings in this action should not be stayed.

It appeared from the affidavits, that the plaintiffs had never authorized the attorney on the record to bring the action, and that they had never heard of the action having been brought until they received the usual twenty days' notice to proceed to the trial of the cause under s. 101 of the Common Law Procedure Act, 1852. It also appeared that the attorney for the plaintiffs on the record was in insolvent circumstances.

Murphy shewed cause. The rule which prevails where proceedings have been instituted by an attorney without authority is to be found laid down in *Bayley* v. *Buckland.* (1) The Court will set aside the proceedings, on the application of the party for whom he has appeared, on equitable terms, if the attorney is insolvent; but if he be solvent the Court will not interfere; they will leave the party to his remedy against the attorney. This law is laid down in an anonymous case in Salkeld (2), and has been acted on in *Barber* v. *Wilkins* (3), *Mudry* v. *Newman* (4), and *Hubbart* v. *Phillips.* (5) Here the attorney being insolvent, the Court will not relieve the plaintiffs, except on terms; the proceedings ought not to be set aside without the payment of costs.

[BLACKBURN, J. In *Robson* v. *Eaton* (6) the question was raised on the record; and it would appear, from Lord Mansfield's judgment, that the plaintiffs would be entitled to have the proceedings set aside. That case appears to be inconsistent with the anonymous case in Salkeld. (2)]

(1) 1 Ex. 1; 16 L. J. (Ex.) 204.
(2) 1 Salk. 86, 88.
(3) 5 Dowl. 305.
(4) 1 C. M. & R. 402.
(5) 13 M. & W. 702.
(6) 1 T. R. 62.

Fullarton, in support of the rule, relied on *Robson* v. *Eaton* (1), and cited also *Hoskins* v. *Phillips*. (2)

BLACKBURN, J. The plaintiffs have a right to have the action stayed; but the question is, whether it ought to be on payment of costs. There is some little difficulty in the case. In the earlier case in Salkeld (3) it is laid down that where an attorney takes upon him to appear, the Court looks no farther, and leaves the party to his action against him. Then came the case of *Robson* v. *Eaton* (1), which is a contrary decision. There the question was raised on the record. The plea, to an action for money had and received, was that the defendant had been sued in the Common Pleas for the same cause of action, and that, in the course of that suit it was ordered by the Court that the defendant should pay the plaintiff 62*l*., if he would accept it, in discharge of the claim; if not, that he should pay the same into court; and that, in pursuance of the order, he paid it into court; and that one Hodgson, the attorney of the plaintiff in the suit, took the same out of court; to this the replication was, that Hodgson was never retained by the plaintiff to implead the defendant or impowered to receive the money out of court. The rejoinder to the plea was, not asserting the retainer, but that Hodgson was admitted and received on record by the Court of Common Pleas as the attorney of the plaintiff, and permitted by the Court to receive the money out of court. Then, on demurrer, Lord Mansfield, C.J., held that the plaintiff was entitled to judgment. That case is perfectly inconsistent with the case in Salkeld. How can we say that we ought to impose terms on staying these proceedings, which, if the action went on further, would be a nullity. The judgment of Parke, B., in *Mudrey* v. *Newman* (4) seems to shew he considered the case in Salkeld to be rightly decided, and he followed that case when sitting alone in the Bail Court in *Barber* v. *Wilkins*. (5) Afterwards the case of *Hubbart* v. *Phillips* (6) was decided, in which Parke, B., cites *Robson* v. *Eaton* (1), and decides in accordance with the judgment of Lord Mansfield. There is also the case of

(1) 1 T. R. 62.
(2) 16 L. J. (Q.B.) 339.
(3) Anon. 1 Salk. 86, 88.
(4) 1 C. M. & R. 402.
(5) 5 Dowl. 305.
(6) 13 M. & W. 702.

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Stanhope v. *Firmin* (1), where, in the judgment of the Court, the rule mentioned by Holt, C.J., in the case in Salkeld is alluded to, but I do not think the Court decided that the rule so laid down was binding. In this case, as the action was brought without authority, on the authority of *Robson* v. *Eaton* (2), the plaintiffs are entitled to have the action stayed, and without payment of costs. I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act.

ARCHIBALD, J. I think in the cases which lay down the rule that where the attorney is solvent the Court will not interfere to set aside or stay the proceedings which have been instituted without authority, sufficient attention has not been paid to *Robson* v. *Eaton*. (2) We must regard that case as a decision binding on us, and to be acted on. I therefore agree with my Brother Blackburn that this rule must be made absolute without payment of costs.

Rule absolute.

Attorneys for plaintiffs: *Dod & Longstaffe.*
Attorneys for defendant: *Field, Roscoe, & Co.*

June 2.

THE QUEEN *v.* CURZON AND OTHERS, JUSTICES OF MIDDLESEX.

Beerhouse "licensed on the 1st of May, 1869"—Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, Construction of.

Where a licence or certificate of a house licensed on the 1st of May, 1869, has afterwards dropped or been refused, the justices, on the true construction of s. 19 of 32 & 33 Vict. c. 27, have the same discretion to refuse a fresh certificate for a licence to sell beer to be consumed on the premises as if the application were in respect of a house which had not been licensed on the 1st of May, 1869, and the repeal of the declaratory section (3) of 34 & 35 Vict. c. 88, is immaterial.

RULE calling on certain justices of Middlesex to shew cause why a mandamus should not issue commanding them to grant or

(1) 3 Bing. N. C. 301, 304. (2) 1 T. R. 62.

renew a certificate for a licence to sell beer by retail to be consumed on the premises.

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, "where on the 1st of May, 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale therein of beer, &c., to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, &c., to be consumed on the premises in respect of such house or shop, except on one or more of the grounds mentioned upon which an application for a certificate under this Act in respect of the licence for the sale of beer, &c., not to be consumed on the premises may be refused in accordance with this Act." (See s. 8.)

By the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29), s. 7, the above s. 19 is to extend to licences granted by way of renewal, from time to time, of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person.

By the Intoxicating Liquors (Licences Suspension) Act, 1871 (34 & 35 Vict. c. 88), s. 3, referring to the above s. 19, and reciting "that doubts have arisen whether such prohibition [to the justices] extends to the case of an application for a certificate with respect to any such house or shop, if the licence which was in force on the 1st of May, 1869, or any certificate since granted in respect of the said house or shop, has by forfeiture, lapse of time, or otherwise, ceased to be in force, and it is expedient to remove such doubts: It is therefore hereby declared that in the case of any such application the justices may, in their discretion, refuse the application upon any ground upon which they might refuse the application if made for a certificate in respect to any house or shop with respect to which a licence was not in force on the 1st of May, 1869.

The Act of 1871 was repealed in toto by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, sch. 2, and the above sections, inter alia, of the Acts of 1869 and 1870 were made perpetual.

Isaac Coney was the occupier of a house which was licensed for the sale of beer by retail on the premises on the 1st of May, 1869;

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the licence expired in October, 1869, and was not renewed, no application being made in the year 1869–70. In March, 1872, Coney applied for a certificate, but was refused by the justices in the exercise of the discretion declared by s. 3 of the Act of 1871 not to be taken away from them by s. 19 of the Act of 1869. The Act of 1871 having been afterwards repealed by the Act of 1872, Coney applied in March, 1873, for a certificate as of right under s. 19 of the Act of 1869, but the justices again refused, on the ground that the licence having dropped they had a discretion to grant or refuse the certificate.

Bosanquet shewed cause.

Field, Q.C., and *Besley* in support of the rule.

THE COURT (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) held that on the true construction of s. 19 of the Act of 1869 confirmed by s. 7 of the Act of 1870, the justices were not prohibited from exercising their discretion in the case of a house licensed on the 1st of May, 1869, the licence or certificate of which had lapsed before the application for renewal. Moreover, the case of *Hargreaves* v. *Dawson* (1) (Q. B. April 29, 1871) was a decision precisely in point by Cockburn, C.J., Mellor and Lush, JJ., before the Act of 1871 was passed. The repeal of the declaratory section (3) of that Act was, therefore, in the present case immaterial, whatever the effect might otherwise have been.

Rule discharged.

Attorneys for prosecution: *Hunter, Gwatkin, & Co.*

Attorneys for justices: *Allen & Sons.*

(1) 24 L. T. (N.S.) 428.

THE QUEEN *v.* EVAN POWELL.

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May 23.

Highway, Stopping up—5 & 6 *Wm.* 4, *c.* 50, *ss.* 84, 85—*Notice of Vestry*—"*Special Purpose*"—58 *Geo.* 3, *c.* 69, *s.* 1.

J. P. having taken legal proceedings against the surveyor of the highway district to compel the repair of a highway in the hamlet of T. called "Blaenau Bach Road," a notice was issued by the overseer of the hamlet that "a meeting of the ratepayers of the hamlet of T. would be held, for the purpose of taking into consideration the proceedings now taken by Mr. J. P. against the surveyor of the highway district respecting Blaenau Bach Road, and for other purposes connected with the highways of the hamlet." At the vestry meeting so convened it was resolved, that the road should be stopped up under the provisions of 5 & 6 Wm. 4, c. 50; and proceedings were accordingly taken, and a certificate of two justices obtained, for the purpose; and the certificate, &c., were confirmed and enrolled at quarter sessions. A rule was afterwards obtained to quash the order of quarter sessions and certificate on the ground that the notice announcing the meeting did not specify the "special purpose" for which the meeting was held, as required by 58 Geo. 3, c. 69, s. 1:—

Held, that the notice was sufficient.

RULE calling upon the prosecutors, the parish officers of Talgarth and the surveyor of the Talgarth highway district, to shew cause why an order of quarter sessions, confirming a certificate of two justices of the county of Brecon, dated the 27th of February, 1872, for stopping up a highway called the Blaenau Bach Road, in the hamlet of Trevecca, in the parish of Talgarth, in the said county, together with the necessary proofs, and ordering the same, together with the plans thereunto annexed, to be enrolled amongst the records of the court of quarter sessions, and also the said certificate, should not be quashed.

The order of quarter sessions, and the certificate, and the other documents, had been brought up by certiorari.

The certificate, dated the 27th of February, 1872, recited that, "on the 12th of January, 1871, the inhabitants of the hamlet of Trevecca being then duly assembled in vestry in pursuance of a notice issued by Thomas Williams, the overseer of the hamlet, for the purpose of determining whether it was expedient, under the provisions of 5 & 6 Wm. 4, c. 50, that a highway in the hamlet, called Blaenau Bach Road (describing it), shall be entirely stopped up as being unnecessary, did resolve that it was expedient the said highway should be stopped up as being useless and unnecessary,

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under the provisions of the said Act." The certificate then alleged, in the usual form, all the proceedings in detail under the Act, and that the two justices, after view, &c., for the reasons given, do certify that the highway is useless and unnecessary.

On appeal against this certificate, in which Evan Powell was appellant, and the parish officers of the parish of Talgarth and the surveyor of the Talgarth highway district respondents, the quarter sessions dismissed the appeal, on the ground that due notice of appeal had not been given, and the order was made, reciting the certificate, that the certificate, &c., be confirmed and enrolled.

The notice under which the vestry meeting of the 12th of January, 1871, was convened and held was as follows:—

"Hamlet of Trevecca. I, the undersigned, hereby give you notice that a meeting of the ratepayers of the above hamlet will be held at the vestry-room of Talgarth Church in Talgarth, at ten o'clock in the forenoon of Thursday, the 12th day of January, 1871, for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of Trebinshaw, against Mr. Rhys Davis, surveyor of the Talgarth district highway board, respecting Blaenau Bach Road, and for other purposes connected with the highways of the above hamlet. January 7th, 1871. Thomas Williams, Overseer of the poor of the hamlet of Trevecca."

Numerous affidavits were filed on both sides, from which it appeared that before the above notice legal proceedings had been taken by Mr. John Parry, an adjoining landowner, against the surveyor of the Talgarth district highway board, for not repairing the road in question, in order to compel the hamlet to repair it, the road having become partially disused and entirely out of repair. (1)

B. T. Williams shewed cause. All the proceedings under 5 & 6 Wm. 4, c. 50, s. 84, are substantially correct; the only real objection is that they were without jurisdiction, on the ground that,

(1) The affidavits on the one side also alleged, and the affidavits contrà denied, that it was well known in the hamlet, that the stopping up of the highway was to be taken into consideration at the meeting of the 12th of January, 1871; but the Court refused to consider these allegations, the question was whether the notice itself gave sufficient information.

under the notice convening the vestry meeting, at which the resolution, the foundation of the proceedings, was passed, it was not competent to pass such a resolution, as the "special purpose" of the meeting was not sufficiently given as required by 58 Geo. 3, c. 69, s. 1, which enacts that "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden, until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day so appointed for holding such vestry. . . ." Here the special purpose was specified in the notice, viz., the consideration of the proceedings taken by Mr. Parry to enforce the repair of this particular road, and the mode of dealing with the proceedings would naturally be left open for the consideration of the vestry. In *Warner* v. *Gater* (1) the special purpose stated in the notice was the making of a church rate, and it was held that the exact object to which the rate was to be applied, viz., the expenses of the consecration of a new church need not be stated, and that no one could have been taken by surprise. In *Smith* v. *Deighton* (2) the notice was held to have been too specific, and *Warner* v. *Gater* was referred to by members of the council as shewing that a general notice would be sufficient, and that by being too specific, a more general mode of dealing with a subject might be prevented. *Blunt* v. *Harwood* (3) is still stronger in favour of this notice. There plans for improving the church had been referred by a vestry meeting to a committee, and a notice was given for holding a meeting, the purpose of which was "to receive the report of the church committee and to adopt such measures as may appear necessary for carrying that report into execution," and it was held competent to the vestry under that notice to pass a resolution for borrowing money on the parish rates. And all the members of the Court agreed that the general nature of the business to be brought before the vestry was all that the statute required.

The Court then called upon

J. Brown, Q.C., and *Byles*, in support of the rule. Sects. 84–89 of 5 & 6 Wm. 4, c. 50, require the greatest particularity to be

(1) 2 Curt. 315, 318. (2) 8 Moo. P. C. 179, 186.
(3) 8 A. & E. 610, 617.

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THE QUEEN v.

observed before a highway can be stopped up or even partially diverted; and s. 84 requires, as the first step, a resolution of the inhabitants in vestry assembled; and no resolution of a vestry would be valid unless notice of the "special purpose" had been given in accordance with 58 Geo. 3, c. 69, s. 1. Now the notice confines the special purpose to the consideration of Mr. Parry's proceedings, how they were to be dealt with, and that could only be by repairing the road or opposing an indictment under s. 111; and stopping up the highway could never have been understood as coming under "the consideration of Mr. Parry's proceedings against the surveyor respecting the Blaenau Bach Road." In *Smith* v. *Deighton* (1) Dr. Lushington says: "Undoubtedly, it was the intention of the legislature in framing this statute to provide that due information should be given to all the parishioners of the special purpose for which their attendance is required. These enactments were made to remedy the great evils that had arisen from convening a meeting upon a general notice, the parishioners being entirely ignorant of the particular purpose for which they were called upon to meet. We are clearly of opinion that, in order to comply with the requirements of the statute, the special purpose intended to be discussed should be stated in the notice calling the meeting." The decision in *Blunt* v. *Harwood* (2) proceeded on the general words added at the end of the notice, "and to adopt such measures as may be necessary for carrying the report into execution," and borrowing money was an obvious measure for this. But there are no such words here; the general words at the end are much too vague, and no one could suppose from the notice that the measure of stopping up the highway would be proposed. Persons interested might not care what became of Mr. Parry's proceedings; but they might have attended and opposed the resolution had they supposed that it was meant to propose the absolute stopping up of an old highway.

BLACKBURN, J. I am of opinion that this rule must be discharged. The only question is, whether the vestry meeting which resolved, under s. 84 of 5 & 6 Wm. 4, c. 50, that it was expedient to stop up this road, had authority to pass such a resolution. The

(1) 8 Moo. P. C. at p. 187. (2) 8 A. & E. 610.

58 Geo. 3, c. 69, s. 1, enacts that no vestry shall be held until three days notice has been given "of the place and hour of holding the same, and the special purpose thereof;" and I agree that if the notice given was not in such terms as to give notice to the inhabitants that one of the purposes of holding the meeting might be to consider whether it would be expedient that the road should be stopped up, the meeting would have no jurisdiction to entertain the subject, and the passing of such a resolution would be ultra vires. [The learned judge read the notice.] The fact was that Mr. Parry had taken steps, by proceedings against the surveyor, to enforce the repair of this road; and it certainly does seem to me, that when the vestry is summoned to take into consideration these very proceedings of Mr. Parry, as well as for other purposes connected with the highways of the hamlet, sufficient notice of the special purpose was given. Patteson, J., says, in *Blunt* v. *Harwood* (1), "No particular form of notice is directed by any of the three statutes: we have only to see that the notice published gives sufficient information to the inhabitants. Here no man applying common sense to the subject could have the slightest doubt that, if the vestry determined on building or enlarging, a rate must be levied or money borrowed." So here, no one using common sense could have the slightest doubt as to the purpose of the meeting, viz., to consider and oppose, if necessary, the proceedings of Mr. Parry; and it would be understood that, with a view to oppose and baffle his proceedings, the vestry would exercise any powers given them as to highways. No other way of opposing the proceedings has been suggested, except stopping up the road; but it was suggested that the vestry, under this notice, might have acted under s. 111 of the Highway Act, and taken into consideration the expediency of paying the surveyor's expenses in defending an indictment by Mr. Parry; that might have been one of the matters suggested to the vestry in considering these proceedings; but there is no reason for saying that must be taken to be the sole and exclusive object of summoning the meeting, which was to take into consideration Mr. Parry's proceedings. Now the road was disused, and the best and most effectual and obvious way of baffling and getting rid of the pro-

(1) 8 A. & E. at p. 618.

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ceedings entirely would be by getting the parish to decide that the surveyor should take steps to stop up the road altogether; and this resolution, therefore, seems to me to come within the special purpose for which the meeting was summoned. If the notice gave sufficient information to the inhabitants as to the general nature of the business to be brought forward at the meeting, the object of the statute, as stated by Patteson, J., would be complied with; and so far from greater particularity being required, there seems to be good reason for less particularity, so that the meeting might not be tied down to any particular mode of dealing with the proceedings which were to be taken into consideration. Were we to require in these notices the particularity contended for by counsel, we should be committing the same error as was committed with respect to the poor law notices as to depositions or examinations, as they were called, which called for the intervention of the legislature.

QUAIN, J. I am of the same opinion. It would be extremely undesirable if these notices of parish meetings had to be drawn with such particularity as to require recourse to be had to a lawyer before framing them. It seems to me that the notice now in question gives by implication notice to all the parishioners that one of the matters to be proposed to the meeting might be the stopping up of this road, so as to call them together to consider that amongst other matters relating to the road. The present applicant well knew what proceedings Mr. Parry had taken to compel the surveyor to repair the road; and the notice calls attention to these proceedings, and that they will be taken into consideration. It does not say in what way they would be met, but the particular purpose of the meeting is to consider in what way these proceedings are to be met, whether under s. 111 or under any other sections of the Act, which might afford the parish relief; and therefore by direct implication one of the things to be considered would be whether the road was not useless and whether it would not be the best way to vote that it be stopped up under s. 84. The obvious alternative was open under this notice, in considering Mr. Parry's proceedings against the surveyor, whether the parish should repair the road or stop it up as useless.

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ARCHIBALD, J. I am of the same opinion. The question is, whether the resolution to stop up the road falls reasonably within the special purpose mentioned in the notice. The statute requires that the special purpose of the meeting should be stated in the notice; but it is sufficient if the notice gives information to the parishioners of the nature and subject of the business to be brought before the vestry. If the notice were framed with such generality as to mislead, it would, of course, not be sufficient; and this would have been so had the notice been confined to proceedings under s. 111; but it is in much larger terms, it is for the purpose of taking into consideration the proceedings taken by Mr. Parry against the surveyor respecting this particular road; and that might include the taking into consideration steps either to defend the proceedings or repair the road, or to consider whether it would not be better to stop up the road as useless and not worth repairing. The last alternative, I think, might quite fairly be taken as coming within the scope of the notice; and it would be requiring too great particularity in these parish notices if it were necessary to state the precise mode in which it was proposed to deal with the subject matter to be submitted to the meeting.

Rule discharged.

Attorney for prosecutors: *C. E. Abbott, for W. T. B. Bishop, Brecon.*

Attorneys for defendant: *Dobinson & Geare.*

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May 23.

In the Matter of ELISE COUNHAYE.

Extradition Act, 1870 (33 & 34 *Vict. c.* 52) *ss.* 2, 6, 7, 14, 26, *and sch.* 1 —"*Crimes by Bankrupts against Bankruptcy Law*"—*Procedure required by Treaty—Treaty with Belgium.*

16 QBD 99
105,

In the schedule to the Extradition Act, 1870 (33 & 34 Vict. c. 52) extradition crimes are enumerated, accessories being nowhere mentioned; amongst others are "crimes by bankrupts against bankruptcy law":—

Held, that this could not be extended to complicity, by a person not himself a bankrupt, in a fraudulent bankruptcy.

Semble, that, under s. 14, depositions, duly authenticated, are admissible in proceedings under the Act, though not taken in the presence of the accused, nor on the particular charge.

Semble, that conditions, not required by the Act, but required by a treaty before initiating proceedings under the Act, cannot be taken into account in considering the validity of proceedings under the Act, if the magistrate in other respects had jurisdiction under the Act.

Quære, whether the statute extends to acts committed before the passing of the statute.

On the return to a writ of habeas corpus to bring up the body of Elise Victorine Hortense Counhaye, it appeared that she had been committed to the Middlesex House of Detention, under a warrant of the chief magistrate at Bow Street Police Office, dated the 8th of May, 1873, whereby she,—having been brought before the magistrate to shew cause why she should not be surrendered, in pursuance of the Extradition Act, 1870, on the ground of her being accused of the commission of the crime of complicity in a case of fraudulent bankruptcy within the jurisdiction of Belgium, and no sufficient cause having been shewn why she should not be surrendered,—was ordered to be delivered into the custody of the keeper of the said House of Detention, there to be kept by him until she should be thence delivered pursuant to the provisions of the said Act.

It appeared from the affidavits, that in pursuance of an order from the secretary of state, a warrant had been issued by the chief magistrate for the apprehension of Madame Counhaye; and when she was before the magistrate, on the 8th of May, a warrant for her arrest, in the French language, was produced, issued by a judge or magistrate in Belgium, which stated that Elise Counhaye

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was charged with complicity in a fraudulent bankruptcy in Brussels, in 1870, in having deposited, on the 1st of July, 1870, at the Société Générale de Paris, a sum of 175,000 francs in her own name, in exchange for seven bonds to bearer of that society, which bonds have been withdrawn from the creditors of the bankruptcy of her husband, declared on the 15th of July, 1870, by the Tribunal de Commerce of Brussels, whereas the money with which the purchase of them had been made clearly belonged to the bankrupt himself, as the proceeds of his business.

An adjudication in bankruptcy and a judgment of the Tribunal de Commerce at Brussels against Adolphe Counhaye, husband of Elise Counhaye, and Victor Counhaye, his brother and partner, were also produced.

Depositions were also put in, taken upon the adjudication in bankruptcy, and on the charge of fraudulent bankruptcy, and also depositions relating to the charge of Elise Counhaye's complicity in the fraudulent bankruptcy. These depositions were all taken in the absence of the accused; and none of them were taken before the judge or magistrate who had issued the warrant for her arrest.

It appeared from the documents, depositions, and the oral evidence before the chief magistrate, that Elise Counhaye, on the 1st of July, 1870, went with her husband to the office of the Société Générale at Paris, and purchased seven bonds of the society for 175,000 francs, which she paid in cash. They returned to Brussels a few days afterwards, and on the 17th of July they left Brussels and went to London, taking with them their children and effects. The husband and his brother had carried on business at Brussels up to that time, and about that time they withdrew from various banks the greater part of 300,000 francs belonging to them as the proceeds of their business. On the 25th of July, 1870, having fled from Belgium, they were there adjudged bankrupts.

On the above documents and evidence the chief magistrate committed Elise Counhaye, under s. 10 of the Extradition Act, 1870, to await the warrant of the secretary of state for her surrender.

The Extradition Act, 1870 (33 & 34 Vict. c. 52), was passed on the 9th of August, 1870.

By s. 2, Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may,

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by order in council, direct that this Act shall apply in the case of such foreign state. . . .

By s. 6, Where this Act applies in the case of any foreign state, every fugitive criminal of that state, who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

By s. 7, A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a secretary of state by some person recognised by the secretary of state as a diplomatic representative of that foreign state. A secretary of state may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal. . . .

By s. 8, A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom may be issued—1. by a police magistrate on the receipt of the said order of the secretary of state, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; . . .

By s. 10, In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. . . . If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a secretary of state for his surrender, and shall forthwith send to a secretary of state a certificate of the committal, and such report upon the case as he may think fit.

By s. 14, Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

By s. 15, Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law or authenticated as follows:

(1.) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

(2.) If the depositions or statements, or the copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; . . .

By s. 26, in this Act, unless the context otherwise requires . . . the term "extradition crime" means a crime which, if committed in England or within

English jurisdiction, would be one of the crimes described in the first schedule to this Act. . . . The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is or is suspected of being in some part of Her Majesty's dominions.

First Schedule.

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder. Manslaughter. Counterfeiting and altering money, and uttering counterfeit or altered money. Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered. Embezzlement and larceny. Obtaining money or goods by false pretences. Crimes by bankrupts against bankruptcy law. Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force. Rape. Abduction. Child stealing. Burglary and housebreaking. Arson. Robbery with violence. Threats by letters or otherwise with intent to extort. Piracy by law of nations. Sinking or destroying a vessel at sea, or attempting or conspiring to do so. Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm. Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

On the 31st of July, 1872, in pursuance of the above Act, a treaty was signed between the Queen of England and the King of the Belgians, which treaty was ratified on the 29th of August, 1872; and on the 15th of October, 1872, by an order in council, it was ordered that from and after the 28th of October, 1872, the said Act shall apply in the case of the said treaty.

Article I. of the Treaty.

It is agreed that her Britannic Majesty and his Majesty the King of the Belgians shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons, except as regards Great Britain, native born and naturalized subjects of her Britannic Majesty, and except as regards Belgium, those who are by birth or who may have become citizens of Belgium, who, being accused or convicted as principals or accessories before the fact of any of the crimes hereinafter specified, committed within the territories of the requiring party, shall be found within the territories of the other party: [Then followed a list of crimes in the same terms as the schedule to the Act.]

Provided that the surrender shall be made only when, in the case of a person accused, the commission of the crime shall be so established as that the laws of the country where the fugitive or person accused shall be found would justify his apprehension and commitment for trial if the crime had been there committed; and, in the case of a person alleged to have been convicted, on such evidence as, according to the laws of the country where he is found, would prove that he had been convicted.

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In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition.

Article II.

In the dominions of her Britannic Majesty, other than the colonies or foreign possessions of her Majesty, the manner of proceeding shall be as follows:

I. In the case of a person accused—

The requisition for the surrender shall be made to her Britannic Majesty's Principal Secretary of State for Foreign Affairs by the minister or other diplomatic agent of his Majesty the King of the Belgians, accompanied by a warrant of arrest or other equivalent judicial document, issued by a judge or magistrate duly authorized to take cognizance of the acts charged against the accused in Belgium, together with duly authenticated depositions or statements taken on oath before such judge or magistrate, clearly setting forth the said acts, and containing a description of the person claimed, and any particulars which may serve to identify him. The said Secretary of State shall transmit such documents to her Britannic Majesty's Principal Secretary of State for the Home Department, who shall then, by order under his hand and seal, signify to some police magistrate in London that such requisition has been made, and require him, if there be due cause, to issue his warrant for the apprehension of the fugitive.

On receipt of such order from the Secretary of State, and on the production of such evidence as would, in the opinion of the magistrate, justify the issue of the warrant if the crime had been committed in the United Kingdom, he shall issue his warrant accordingly.

When the fugitive shall have been apprehended, he shall be brought before the police magistrate who issued the warrant, or some other police magistrate in London. If the evidence to be then produced shall be such as to justify, according to the law of England, the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison to await the warrant of the Secretary of State for his surrender; sending immediately to the Secretary of State a certificate of the committal and a report upon the case.

After the expiration of a period from the committal of the prisoner, which shall never be less than fifteen days, the Secretary of State shall, by order under his hand and seal, order the fugitive criminal to be surrendered to such person as may be duly authorized to receive him on the part of the Government of his Majesty the King of the Belgians.

Sir J. B. Karslake, Q.C., Day, Q.C., and *Roland V. Williams,* moved the discharge of the prisoner. There are several objections against the surrender of this prisoner. In the first place, complicity in a fraudulent bankruptcy is not a crime within the Extradition Act. By the treaty accessories before the fact to all the crimes mentioned are expressly included; but the treaty cannot extend the Act, and although accessories to most of the crimes included in the schedule would be included, perhaps; yet when

the definition is "crimes by bankrupts against bankruptcy law," only a fraud by the bankrupt himself can be included. Moreover, by s. 26 the fraud must be one which is a crime by English law. Misdemeanors of fraudulent debtors are enumerated in the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11. The husband may possibly have been guilty of an offence under subs. 5 of fraudulently removing his property; but there is no evidence to connect the purchase of these bonds, which is the act charged against Madame Counhaye, with the fraudulent removal of the bankrupt's property. Again, the facts charged were committed before the Act passed, and s. 6 can only apply to crimes committed and persons becoming fugitives after the Act passed, although it is made to apply to cases taking place before the order in council. There are also several minor objections to the proceedings; first, the depositions produced before the chief magistrate—and it must be taken that there were no others before the secretary of state—were not taken before the magistrate who issued the warrant of arrest, and Article II. of this treaty requires that they should have been taken before such judge or magistrate.

[BLACKBURN, J. The Act (s. 7) does not make the production of a warrant and depositions a condition precedent to the secretary of state acting, as the treaty does. Under the Act the only question is, whether the magistrate had jurisdiction.]

Another objection is, that the depositions, not having been taken in the presence of the accused, ought not to have been received in evidence.

[BLACKBURN, J. Sect. 14 makes any depositions on oath receivable in evidence.]

Lastly, the Belgian warrant is bad, it charges a crime committed in France, not in Belgium, and it is not the same crime as in the English warrant of committal.

Sir J. D. Coleridge, A.G. (with him *C. Bowen*), in support of the warrant of commitment, was requested by the Court to confine his argument to the two points, whether an extradition crime had been committed by the prisoner, and whether the Act applied to facts taking place before it passed. No doubt the first is the great question in the case. Accessories are expressly mentioned

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in the treaty, but it must be conceded that this cannot be taken to extend the Act. In the schedule to the Act accessories before the fact are nowhere mentioned, because at common law they are in effect the same as principals; and it cannot be contended that accessories are not included. Moreover, aiders and abettors by statute can be tried as well as punished as principals.

[BLACKBURN, J. In the particular class of crimes now in question the schedule says, "crimes by bankrupts against bankruptcy law."]

The Court being against the committal on this point, it would be useless to argue any other.

BLACKBURN, J. We are all of opinion that the prisoner must be discharged on the point which has been argued by the Attorney General. As to the objection that the terms of the treaty have not been complied with, and the order of the secretary of state ought therefore not to have been made, I do not think that affects the magistrate's jurisdiction; if the conditions of the treaty have not been complied with the secretary of state might have refused to order a magistrate to proceed; but these conditions are not in the Act of Parliament; and the secretary of state having made an order, and the magistrate having acted under it, all we have to do is to look at the Act to see whether he had jurisdiction under it. We are, I believe, also all agreed that s. 14 makes depositions properly authenticated evidence in proceedings under the Act, whether they are taken in the particular charge or not, and whether taken in the presence of the person charged or not. In most European states, I believe, it is not the practice to take the depositions in the presence of the accused; at all events, the law is indifferent in the matter. I would add that it is for the magistrate to give what weight he thinks proper to depositions so taken.

On the real question I feel obliged to say that the Act does not apply to the present case. This country is bound by the treaty with Belgium to give up persons accused of certain crimes, provided the particular crime charged is included in the Extradition Act. A list of the crimes contemplated is given in the first schedule, amongst which are "crimes *by bankrupts* against bankruptcy law:" and I do not see how that can include a person,

not a bankrupt, but accused of complicity in a fraudulent bankruptcy. I agree with the Attorney General that as to many of the crimes included in the list accessories before the fact would be included; they are now liable to be indicted as principals, and were always liable to be punished as principals. But the description of most of the crimes in the schedule is general—forgery, abduction; whereas in the description of this particular crime, it must be committed by bankrupts; and I think we cannot, without stretching the meaning, extend it to persons who are not themselves bankrupts. It may have been a mistake in the legislature or intentional; but whatever was the intention it is impossible for us, with the language used, to say that the prisoner has been guilty of an extradition crime, for she has not been guilty as a bankrupt of a crime against bankruptcy law. As to whether the Act applies to crimes committed before the Act passed, I express no opinion, beyond this, that it is at least very doubtful; and it would be well to clear up the doubt if it was intended under s. 6, to give the Act this retrospective effect. (1)

QUAIN, J. I am of the same opinion. It seems to be impossible to get over the expression "by bankrupts." In the enumeration of the other crimes the schedule does not say by whom; and the definition may well be taken to include aiders and abettors; but in this particular case a particular class of persons is mentioned; and it would be to put a most forced construction on the Act to say that "crimes by bankrupts against bankruptcy laws" can include persons, who assist others in committing crimes against those laws, but are not themselves bankrupts.

(1) By 36 & 37 Vict. c. 60, s. 2, after reciting s. 6 of the principal Act (33 & 34 Vict. c. 52), and the doubts that had arisen as to the application of the section, it is enacted that "a crime committed before the date of the order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly."

By s. 3 "Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly."

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ARCHIBALD, J. I agree with my Brother Blackburn on the other two points; and I also agree that the prisoner is entitled to her discharge on the ground that if guilty she has not been guilty of an offence within the schedule. We cannot reject the words "by bankrupts," and as the prisoner was not herself a bankrupt the crime charged against her is not within the Act.

Rule absolute. (1)

Attorneys for prisoner: *Ingle, Cooper, & Holmes.*
Attorney contrà: *Solicitor to Treasury.*

May 26.

THE QUEEN *v.* HARRALD.

Municipal Corporation—Election of Town Councillor—Selection by Burgess of his Ward—5 & 6 Wm. 4, c. 76, s. 44.

By 5 & 6 Wm. 4, c. 76, s. 44, "If a burgess be rated in respect of distinct premises in two or more wards he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one."

A burgess of a borough, divided into wards, was on the roll for two wards; at the election of town councillors he voted for H. in one ward, and immediately afterwards voted in the other ward:—

Held, that the vote for H. was good: for that by voting in one ward the burgess had properly made his selection; and the fact of his voting afterwards in the other ward could not vitiate his previous vote.

INFORMATION in the nature of a quo warranto, to try the right of the defendant to exercise the office of town councillor of the municipal borough of Sunderland.

At the trial before Willes, J., at the Durham Summer Assizes, 1872, it appeared that at the election of town councillors for the borough of Sunderland, in November, 1871, the defendant was returned as elected by a certain majority over the next candidate, which was reduced at the trial to one. Sunderland is divided into wards, and one William Cockburn was on the roll of burgesses both for Sunderland ward and Bishopwearmouth ward, and he first voted for the defendant in the Sunderland ward, and immediately afterwards voted for another candidate in the other ward.

The learned judge held the vote given for the defendant good, and directed a verdict for the defendant.

(1) See note (1), ante, p. 417.

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A rule was afterwards obtained for a new trial on the ground of misdirection.

C. Crompton (*Carr* with him) shewed cause. By s. 44 of 5 & 6 Wm. 4. c. 76, "Every burgess of any borough shall be entitled to vote in the election of the councillors and assessors to be chosen within that ward in which the property of such burgess for which he appears to be rated on the burgess roll for the time being of such borough shall appear to be situated, and not otherwise; and if any burgess shall be rated in respect of distinct premises in two or more wards, then he shall be entitled to be enrolled and to vote in such one of the said wards as he shall select, but not in more than one." Here Cockburn, being on the roll for two wards, had a right to select in which of the two wards he would vote, and not having selected before he properly exercised his right at the election by voting for the defendant, and he having thus made his selection, his vote was good: *Reg* v. *Tugwell*. (1) The fact of his afterwards (though immediately) tendering his vote in another ward cannot affect the validity of his previous vote.

Herschel, Q.C., and *Shield*, in support of the rule. The fact of Cockburn voting in the two wards concurrently shewed that he had not intended to select the Sunderland ward. The question, whether an election has been made or not, when not expressed in words, must be a question of intention to be determined by the acts of the party. At the least, therefore, the question of intention ought to have been left to the jury.

[BLACKBURN, J., referred to Com. Dig. Election (C), Determination of an Election (C 1.) What shall be. "A determination of a man's election shall be made by express words, or by act. As if a man, who has election to have a fee in one acre or another, makes a feoffment of one of them: this determines his election: 1 Rol. 726 D 1." (C 2.) What not. "If a man once determines his election, it shall be determined for ever; as if an obligation delivered to the use of A. be refused when he is first informed of it, he cannot afterwards accept it. R. 1 Rol. 726, l. 15." "If a man distrains for rent, he shall never after have an annuity; nor vice versâ. Vide Co. Lit. 145, a, b."]

(1) Law Rep. 3 Q. B. 704, 713.

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THE COURT (BLACKBURN and QUAIN, JJ.) discharged the rule. There could be no doubt that the vote given for the defendant was good. By voting in one of the two wards, Cockburn had properly made his selection, as was held in *Reg.* v. *Tugwell* (1); and the fact of his tendering his vote afterwards in the other ward could not vitiate his previous vote.

Rule discharged.

Attorneys for relator: *Harle & Co.*

Attorney for defendant: *J. W. Hickin, for R. Brown & Son, Sunderland.*

June 20.

[IN THE EXCHEQUER CHAMBER.]

THE QUEEN, ON THE PROSECUTION OF E. S. ROBSON, *v.* THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

Trustee of Stock for Railway Company—Possession of Certificate by him—Equitable Mortgage thereof in Breach of Trust—Subsequent Notice to Mortgagee—Right to Legal Transfer of the Stock—Registration—Mandamus.

H., a banker, was a director of the defendants' railway company, and he and another director were the registered proprietors of certain shares in the company, which were held by them as trustees for the defendants. No certificates had been issued to them in respect of such shares. The co-director died. The shares were afterwards changed into stock, and H. having converted some of the stock to his own purposes, was called upon to replace it, and did so by purchasing stock to the same amount, and the defendants issued certificates to him representing the amount of the stock. It was customary to issue stock certificates to registered holders of all consolidated stock, and never the practice to notice on the face of such certificates that the registered proprietors were trustees. In 1866, R., believing H. to be absolute owner of the stock, lent money to him upon the deposit of the certificates as security, together with a written memorandum, by which H. agreed to execute and deliver upon request a valid mortgage and legal transfer of the stock. No notice of this transaction was given to the defendants. R. died, leaving his widow executrix. On the 12th of February, 1869, the defendants found out the fraud of H., and on the 13th of February, gave notice to the executrix that H. had been a trustee for them. On the 5th of May, at her request, H. executed a transfer of the stock to her. On the 20th of May, she delivered the deed of transfer and certificates to the company requiring them to register the transfer and her name as the proprietor of the stock; which they refused to do.

(1) Law Rep. 3 Q. B. 704, 713.

The Court of Queen's Bench having refused a peremptory writ of mandamus to compel the registration:—

Held (reversing the judgment), that the defendants, by issuing and allowing their trustee to possess certificates which imported that the holder had an indefeasible title to the stock, precluded themselves from setting up their right as cestuis que trust against the bonâ fide mortgagee without notice, who acted upon the certificates in advancing the loan; and the executrix was entitled to a peremptory mandamus.

Record 8 B. 7 H. L. Ca. 498.

SPECIAL CASE stated after the return to a writ of mandamus.

The mandamus required the defendants to cause a memorial of the transfer of certain stock to be registered, a certificate of the stock to be delivered to the prosecutrix, and her name and the amount of her interest in the stock to be entered in the register of holders of stock.

Return that the transferor to the prosecutrix was not the holder and proprietor of the stock; but that it was the property of the defendants for whom he was trustee.

1. The prosecutrix is the widow and sole executrix of C. Robson. The defendants are a company subject to the provisions of 9 & 10 Vict. c. cccxxii., cccxxiii., cccxxiv.

1A. In the year 1845 the Company of Proprietors of the Birmingham and Liverpool Junction Canal Navigation was incorporated with the United Company of Proprietors of the Ellesmere and Chester Canal by an Act, 8 Vict. c. ii., and the shares of the Birmingham and Liverpool Company were exchanged into shares of the Ellesmere and Chester Canal Company. In the year 1846 the Ellesmere and Chester Canal Company became the Shropshire Union Railways and Canal Company, under the provisions of the Acts of Parliament referred to in the first paragraph, and the shares of the Ellesmere and Chester Canal Company were exchanged into shares of the Shropshire Union Railways and Canal Company.

2. Under the Acts of Parliament mentioned in paragraph 1, and the other Acts of Parliament relating to the Shropshire Union Railways and Canal Company, and the Acts incorporated therewith, the company raised certain capital by the creation and issue of shares, which shares were fully paid up.

3. After the formation of the company in 1846, ninety-nine shares in the same of the value of 37*l.* 10*s.* each were registered

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in the share register of the company (in lieu of shares which had been originally Birmingham and Liverpool Canal shares), in the names of the late Earl Powis and G. Holyoake (who then were directors of the Shropshire Union Railways and Canal Company), as trustees for the company, and they held the ninety-nine shares as trustees for the company and not in their own right.

4. Earl Powis died in the year 1847, and the ninety-nine shares subsequently to his death remained registered in the names of Earl Powis and G. Holyoake, and continued to be held by G. Holyoake in trust for the Shropshire Union Railways and Canal Company until the year 1854, when the shares were converted into 3712*l.* 10*s.* consolidated stock of the last-mentioned company, under the name or title of the "Shropshire Union Railways and Canal Company Consolidated Stock, 1854," which consolidated stock was registered in the proper books of the company, in the names of Earl Powis and G. Holyoake, and G. Holyoake continued to hold the same as trustee for the company.

5. In the year 1847 an Act, 10 & 11 Vict. c. cxxi., was passed authorizing a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and North-Western Railway Company and providing for the management from and after the passing of that Act, of the undertaking of the Shropshire Union Company by a joint committee consisting of eight Shropshire Union, and eight London and North-Western directors, and from that time the undertaking has been managed by such committee.

5A. G. Holyoake was a director of the Birmingham and Liverpool Canal Company, and also treasurer of that company, and a partner in the firm of Sir F. Goodricke, Holyoake & Co., the bankers of that company. On the incorporation of the Birmingham and Liverpool Company with the Ellesmere and Chester Canal Company he became a director of that company, and his firm were its bankers, and in like manner on the formation of the Shropshire Union Company he became a director of that company, and continued to be so until March, 1869, and on the passing of the Act of 10 & 11 Vict. was appointed one of the Shropshire Union members of the joint committee, and continued to be so until the last-mentioned date. He was a very active member of the board, and his banking firm

were the bankers of the Shropshire Union Company and of the joint committee until May, 1863.

5B. The final settlement of a lease of the Shropshire Union Company's undertaking to the London and North-Western Railway Company, was the subject of much discussion and negotiation, and amongst other disputed points the London and North-Western Railway Company laid claim to the sum of 3712*l.* 10*s.* stock, as being part of the property of the Shropshire Union Company, which they would be entitled to on the execution of the lease. This claim was strenuously resisted by the directors of the Shropshire Union Company, and more especially by G. Holyoake, as one of such directors, and in the end the claim of the London and North-Western Railway Company was waived. The lease, though dated the 25th of March, 1857, was not actually completed until 1860, and its provisions were extended and explained by an agreement also dated the 25th of March, 1857, and executed at the same time as the lease. The 7th and 8th sections of the last-mentioned agreement are as follows:

7. Subject to the right of the Shropshire Union Railways and Canal Company to have realised therefrom such sum and sums as may be necessary to enable them to satisfy their covenant hereinbefore contained, to reduce their debenture and land debts to 724,207*l.*, and to satisfy the other sums in such covenant mentioned as to be paid by the Shropshire Union Railways and Canal Company, all balances, whether of principal or interest, standing to the credit of the Shropshire Union Railways and Canal Company at bankers, and all shares and calls on shares and all interest, dividends, and other moneys due or hereafter to be due or received or recovered in respect of unissued or forfeited or forfeitable shares, which forfeited shares are to be forthwith sold, the same being first offered to the London and North-Western Railway Company, at the price of 45*l.* for every 100*l.* of consolidated stock in the Shropshire Union Railways and Canal Company, and all unclaimed dividends, and all other realised or unrealised earnings, property, effects, and credits of the same, or the like, or of any other kind belonging to the same company, or held or possessed by or in trust for them, or in which they are or may be interested, shall be deemed to be included in the said lease, and shall pass therewith to the said London and North-Western Railway Company, but be under the management and direction of the joint committee as part of the lease capital account, and any interest or other profit which may accrue, or be made in respect of any balance which may at any time be standing to the credit of the lease capital account, shall every half year be accounted for, and form part of the current profits of the working of the undertaking of the Shropshire Union Railways and Canal Company, provided that this clause shall not include or apply to 3700*l.* of old Birmingham and Liverpool Canal Stock, standing in the names of the Earl of Powis and G. Holyoake as trustees, and provided that, as regards the

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past, no charge shall be made against the London and North-Western Railway Company in respect of the dividends on unissued or forfeited shares.

8. Provided always that all registers of shareholders of the Shropshire Union Company, and other books connected therewith, shall belong to and be in the custody of the Shropshire Union Company, but the London and North-Western Company shall have the right to inspect the same, and all deeds and other documents of the Shropshire Union Company shall, during the continuance of the lease, be held by the joint committee for the use and benefit of both the companies parties hereto, but shall remain the property of the Shropshire Union Company.

This agreement was confirmed by the London and North-Western (Additional Powers) Act, 1861, 24 & 25 Vict. c. ccviii.

5c. In the month of March, 1852, the share registers and transfer books and other books connected with the registration of shares in the Shropshire Union Railways and Canal Company were, with the authority of the directors of the company, removed from their offices to the offices of the London and North-Western Railway Company at Euston Square, and the business relating to the transfers of shares, and of the consolidation of the same into stock, and of the transfer of such stock, and the issuing of share certificates, was conducted entirely under the control and management of the officers at the Euston Station of the London and North-Western Railway Company, until after the execution of the agreement, and, in fact, until the month of March, 1863, the Shropshire Union Railways and Canal Company having been compelled to take legal proceedings to enforce the performance by the London and North-Western Railway Company of the 8th sect. of the agreement, which proceedings were actively supported by G. Holyoake.

5D. In May, 1859, G. Holyoake applied at the offices of the London and North-Western Railway Company for stock coupons representing 3712*l.* 10*s.* consolidated stock, and the London and North-Western Railway Company sent the coupons representing the stock to Mr. Alfred Wragge (the then acting secretary of the Shropshire Union Railways and Canal Company) for G. Holyoake, who, having received the coupons from Mr. Wragge with the object of temporarily increasing the nominal amount of the qualification of one H. Tootal, who was at that time deputy chairman of the Shropshire Union Railways and Canal Company, on the 3rd of

December, 1859, transferred the stock to H. Tootal, to whom stock coupons in respect thereof were issued from the offices of the London and North-Western Railway Company, such stock forming in the books of the Shropshire Union Railways and Canal Company one account with other stock then held by the said H. Tootal. This stock was re-transferred by H. Tootal into the joint names of G. Holyoake and L. R. Holyoake, on the 4th of January, 1861, to be held by them as trustees for the Shropshire Union Railways and Canal Company, and stock coupons in their names were issued by the London and North-Western Railway Company.

5E. Under the 10th section of the agreement of the 25th of March, 1857, the shareholders in the Shropshire Union Company are entitled at any time to exchange their stock in that Company for stock in the London and North-Western Railway Company at the rate of 100*l.* of Shropshire Union stock for 50*l.* of London and North-Western stock.

In March, 1861, G. Holyoake (he then being owner and proprietor of other stock amounting to 1185*l.* 10*s.* standing in his own name in the Shropshire Union Company) and L. R. Holyoake, without the actual knowledge or consent of the Shropshire Union Company, the transfer books being then kept at Euston Station, converted 3000*l.* of the trust stock into London and North-Western stock and disposed of the same. At this time he was still a director and banker of the Shropshire Union Company, and his banking firm always held in hand large sums of money belonging to such company.

5F. In October, 1861, some of the then London and North-Western members of the Shropshire Union Joint Committee called attention to the fact that 3000*l.* of the trust stock had been converted and sold. A communication was subsequently made to G. Holyoake by the chairman of the Shropshire Union Company, the present Earl Powis (son of the deceased Earl) calling his attention to the circumstance. On the 26th of February, 1862, G. Holyoake wrote to Lord Powis that this particular stock had been converted in consequence of its having become mixed up with his own, and that he would take steps to replace it. He also stated afterwards to the secretary of the Shropshire Union Company that he found difficulty in buying back Shropshire Union stock in the

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market, a large proportion of such stock having been converted into London and North-Western stock.

5G. G. Holyoake had at this time standing in his own name Shropshire Union stock amounting to 1185*l.* 10*s.*, and in the joint names of himself and L. R. Holyoake stock amounting to 962*l.* 10*s.*, of which 712*l.* 10*s.* was part of the trust stock. In order to make up the amount of the trust stock, G. Holyoake and L. R. Holyoake transferred from their joint names into the name of G. Holyoake stock amounting to 931*l.* parcel of the 962*l.* 10*s.* and G. Holyoake purchased in his own name other stock, which, added to the 1185*l.* 10*s.* and 931*l.* made up the whole of the 3712*l.* 10*s.* stock which from that time he has held as trustee in trust for the Shropshire Union Railways and Canal Company and from thenceforth all the dividends which have become payable on the stock were invested in the names of the chairman of the company and other directors thereof, who have held the same as trustees for the company.

5H. When G. Holyoake was called upon to replace the trust stock he was in possession of coupons for the 1185*l.* 10*s.* stock, and he continued to hold the same. On the transfer of the 931*l.* into his own name as mentioned in the last paragraph, coupons were issued to him, and in respect of the 1596*l.* stock purchased by him to make up the 3712*l.* 10*s.* stock, coupons were from time to time issued to him, the whole of which stock he held in trust for the Shropshire Union Railways and Canal Company.

6. In the year 1865, G. Holyoake was informed by the secretary of the company, in reply to a letter from G. Holyoake to him, that there was not any Shropshire Union Stock standing in his, G. Holyoake's, own name solely, except the 3712*l.* 10*s.* consolidated stock.

7. Before the date of the deposit of stock coupons, in the 10th paragraph mentioned, G. Holyoake, being in fact trustee for the company of the 3712*l.* 10*s.* of the consolidated stock, had been and then was registered as the holder thereof on the register of the stockholders of the company, and certain stock coupons had been issued to G. Holyoake. It is customary to issue stock coupons to the registered holders of all consolidated stock, and it is never the practice to set out or notice on the face of such coupons that the registered proprietors are trustees.

8. G. Holyoake, notwithstanding he was such trustee for the company, and without the knowledge and in fraud of the company, between February, 1863, and April, 1866, deposited the coupons for the stock so held by him in trust for the company with the Union Bank of London as security for a loan of 1500*l.*, or thereabouts, made by the said bank to G. Holyoake.

9. Upon the request of G. Holyoake, C. Robson paid to the bank the sum of 1500*l.*, and upon the payment of the sum of 1500*l.* C. Robson received from the bank the coupons for the trust stock. The sum of 1500*l.* so paid to the bank forms part of the sum of 2000*l.* in the agreement and memorandum in the 10th paragraph mentioned, advanced by C. Robson to G. Holyoake, and the coupons were delivered to C. Robson as security for the sum of 2000*l.*

10. On the 5th day of April, 1866, George Holyoake, then being such trustee for the company, without the knowledge, consent, or privity, and in fraud of the company, affected to deal with the trust stock by executing a memorandum as follows:

Memorandum that I, the undersigned George Holyoake, am possessed as of my own property and unincumbered, the following stock in the Shropshire Union Railways and Canal Company, videlicet—

[Here followed a list of the numbers of the shares, and the respective amounts thereof, the sum total of which was 3712*l.* 10*s.*]

And whereas I have drawn and endorsed a promissory note for the sum of 2000*l.*, bearing even date herewith, payable to my own order at three months after the date thereof, and I have deposited the above-mentioned shares as collateral security for the due payment of the note, I hereby undertake and promise, on request, to execute a legal mortgage of the shares, and such mortgage deed is to contain a power of sale, and all usual and customary covenants in such deed, and the same is to be prepared by the solicitors of the holder of the said note at my expense. Dated 5th of April, 1866.

11. C. Robson subsequently made a further advance of the sum of 1000*l.* to G. Holyoake upon the security of the trust stock, and also upon some shares in the Wheal Phœnix Mining Company, and at the time of the advance, and in consideration of advances previously made and extension of the time for payment of the same, certain memoranda of deposit relating to the same were entered into by the said George Holyoake, notwithstanding he was such trustee, without the knowledge, privity, or consent, and in fraud of the company.

Memorandum.—Whereas I the undersigned, G. Holyoake, am possessed of my own property fifteen shares in the Wheal Phœnix Mining Company, standing in the

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name of Sir F. L. Holyoake Goodricke, Baronet, and numbered respectively from 61 to 75 inclusive. And whereas I am also possessed of twenty-four shares in the Shropshire Union Railways and Canal Company (now deposited), with a memorandum bearing date the 5th day of October last, for the due payment of a promissory note for 2000*l.* at six months after the date thereof; the number stated of such shares and stock are therein set forth. And whereas I have charged the said twenty-four shares in the Shropshire Union Railways and Canal Company for the due payment of the sum of 2000*l.* secured by a promissory note dated the 7th day of January next, drawn by me, payable to my own order at three months after the date thereof: And whereas I have this day drawn and endorsed another promissory note for the sum of 1000*l.*, bearing even date herewith, payable to my own order at three months after the date thereof, and is a collateral security for the due payment of the same, I have deposited the fifteen shares in the Wheal Phœnix Mining Company and also charged the said twenty-four shares in the Shropshire Union Railways Company, subject to the hereinbefore-recited memorandum. And I hereby agree that in case the said promissory note for 1000*l.* shall not be paid on arriving at maturity, to pay interest at the rate of 20*l.* per cent. per annum from the date of its becoming due until payment thereof. And I further undertake and promise, on request, to execute a legal mortgage of the said fifteen shares in the Wheal Phœnix Mining Company, and also the said twenty-four shares in the Shropshire Union Railways Company (subject as aforesaid), such mortgage deed to contain a power of sale and all usual and customary covenants in such deed, and the same is to be prepared by the solicitors of the holder of the said promissory note at my expense. Dated 7th of January, 1867.

[There was a similar memorandum in respect of promissory notes for 2000*l.* and 1000*l.*, dated the 5th of April, 1867.]

12. Afterwards Robson died. No deed of transfer was executed in his lifetime. The sum of 2000*l.* which had been advanced under the agreement of the 5th of April, 1866, and interest thereupon remained due and unpaid, and the further sum in the 10th paragraph mentioned also remained due and unpaid, and the coupons were in his possession up to and at the time of his death. The prosecutrix, E. S. Robson, as the executrix of C. Robson, was entitled to the moneys and interest, and the same being unpaid, she required G. Holyoake to execute a deed of transfer of the stock pursuant to the terms of the agreement and memorandum of the 5th of April, 1866, in the 10th paragraph mentioned, which G. Holyoake accordingly executed. It is duly stamped, and was as follows:

I, G. Holyoake, in consideration of the agreement to execute the transfer hereinafter set out and of the sum of 2000*l.* paid to him by C. Robson, deceased, during his lifetime, do hereby bargain, sell, assign, and transfer to E. S. Robson, executrix under the will of the said C. Robson, the sum of 3712*l.* 10*s.* consolidated stock, 1854, of and in the undertaking called the Shropshire Union Railways and

Canal Company, and all accruing and accrued dividends, profits, and advantages thereof, to hold unto the said E. S. Robson, her executors, administrators, and assigns, subject to the several conditions on which I hold the same immediately before the execution hereof. And I, the said E. S. Robson, do hereby agree to accept and take the said stock subject to the conditions aforesaid. [Dated the 5th of May, 1869.]

12A. No notice or intimation of any kind was given to the Shropshire Union Railways and Canal Company by the Union Bank or C. Robson, that they or either of them had any claim on the stock. It is the frequent but not invariable practice, if money is advanced upon deposit of railway shares or stock and a transfer not registered, for the lender to give notice to the secretary of the company of his lien. No application was ever made on behalf of the Union Bank or Robson for the dividends payable on the stock, but the dividends were regularly received by the company, G. Holyoake each half-year countersigning the dividend warrants and returning them to the secretary of the company.

The first notice the company received that G. Holyoake had been dealing with this replaced stock was on the 13th of February, 1869, and up to that time the company and its officers were entirely ignorant that the stock coupons had been deposited or dealt with in any way by G. Holyoake.

13. Before the deed of transfer in the 12th paragraph mentioned was prepared or executed, on the 13th of February, 1869, the Shropshire Union Company immediately on the discovery of the fraud committed by G. Holyoake in so assigning over, gave notice in writing to E. S. Robson, through her attorney, that G. Holyoake had no right to mortgage the stock, as the stock was standing in his name merely as a trustee. Previously to the date of the above notice neither E. S. Robson nor C. Robson had notice or knowledge that the stock was held by G. Holyoake upon any trust.

On the 20th of May, 1869, the deed of transfer and the coupons were delivered by E. S. Robson to the secretary of the company in order that a memorial thereof should be entered in the register of transfers of the company, and E. S. Robson requested the secretary to enter the memorial in the register of transfers, and that such entry might be endorsed on the deed of transfer, and that E. S. Robson might be registered as the proprietor of the stock, and

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E. S. Robson offered to pay the proper charges relating to the same, but the secretary thereupon refused to comply with the request.

The questions for the opinion of the Court were, whether the prosecutrix was entitled: 1. To have the memorial of such deed of transfer entered in the books of transfers of the company: 2. To have such entry indorsed on the deed of transfer: 3. To be registered as the proprietor of the stock: 4. To have new coupons of the stock issued to the prosecutrix.

1872. Nov. 9. *Horace Lloyd, Q.C.*, with him *Eyre Lloyd*, for the prosecutrix.

Sir J. B. Karslake, Q.C., with him *McIntyre, Q.C.*, for the defendants.

COCKBURN, C.J. I think the writ of peremptory mandamus ought not to go. The facts appear to be these; the shares in question stood in the name of Holyoake, as registered owner, in the books of the defendants' company; but he held those shares on trust for the company. Under these circumstances C. Robson, the husband of the prosecutrix, made an advance to Holyoake on the deposit of the certificates, believing the latter to be the absolute owner of the shares, and he, C. Robson, was led to think so from the fact that the certificates relating to the shares were in the hands of Holyoake, whereas Holyoake was, in truth, only a trustee. Robson, having thus acquired the equitable estate in the shares, postponed requiring the execution of a transfer of the property in the shares to him by Holyoake. Subsequently to Robson's death, some time after the transaction, the transfer was made, but in the meantime the company gave notice that Holyoake was trustee for the company; so that before Mrs. Robson, as representative of her deceased husband, got the legal estate she had notice from the company of their prior equitable interest in these shares; and after that notice the legal transfer was made. Now the legal estate became vested in the widow, and it was contended, or rather thrown out in the course of argument, that, inasmuch as the legal estate was in the party applying for the mandamus, the Court ought to make the rule absolute for a peremptory mandamus, leaving the opposite party, who raise

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their equity, to resort to Chancery to establish their right. I am, however, of opinion that neither on principle nor authority is the position maintainable. Although the party applying for the mandamus may shew that she has the legal estate, yet, if it appears plain that the parties against whom the process is prayed might obtain an injunction in Equity to restrain her from obtaining it, this Court will not grant the mandamus. There is authority for so saying, and I think it would be an abuse of the power of this Court to grant the peremptory writ under such circumstances. That brings me to the real question in the present case—whether the defendants have a good equitable answer to the claim of the prosecutrix. I think they have. The legal estate of Robson was not acquired until after notice of the prior equitable estate of the defendants, and if that equitable estate did really exist, the transfer would be invalid in a court of equity. There is no doubt, on the facts before us, but that Holyoake held these shares as trustee for the company. If it could have been shewn that there had been anything fraudulent or unlawful in these shares being vested by the company in Holyoake, as trustee, the case might have presented a different aspect; but nothing is brought before us to shew any impropriety in it as regarded from either a legal or moral point of view.

Then, says Mr. Lloyd, they leave the indicia of the property in the hands of the trustee. Was there anything to prevent them doing that, so as to render them liable for their conduct to persons happening to be damaged indirectly thereby? After consideration I think there was not. It appears that by the practice of this and other companies there is nothing to compel them to make any distinction between shares held in trust and shares held in absolute ownership, and wherever shares are held in trust the trustee re-receives the coupons or certificates which are the indicia of his title, and he may deal with the property as he pleases so far as the company is concerned; he may do so without the company being in any way responsible. It being usual, therefore, for the trustee to be registered as absolute owner, and to have power over the certificates, I can see nothing improper in the trustee having been allowed to hold these coupons. If this had been a case of an ordinary trustee, that person could have done exactly what Holyoake

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did in the present instance; and if the same state of things as here had come to pass, the transfer would have been invalid in equity as against his cestui que trust. The same principle applies to this case, there being nothing unlawful in the coupons being left in the hands of the trustee; and I think it is impossible to say there was neglect on the part of the company in leaving the coupons in his possession. This, too, is without regarding the negligence of the other side; for I think a person acts negligently and improvidently in advancing money on such coupons, when he does not know whether the borrower is the actual owner of the shares or only holds them on trust, and that the lender, advancing the money without inquiry, exposes himself to the risk of a cestui que trust coming forward. I much regret that the prosecutrix should be in this unfortunate position, but it is the fault of her deceased husband, who advanced his money without taking care to have a proper transfer made, whereby he would have acquired the legal estate in the shares. I am unable to distinguish this from an ordinary case where the legal estate is obtained after notice of an equitable right, and I think, therefore, our judgment must be for the defendants.

MELLOR, J. I am of the same opinion. At first I was inclined to think, when Mr. Lloyd cited *In re Bahia and San Francisco Ry. Co.* (1), that it had application here, but I now think that the present is not a case of estoppel at all, and that the ground, if any, upon which the defendants might possibly have been made liable would rather have been that of negligence; and that that authority does not apply. I was also struck with the observation by the learned counsel that we do not know the origin of this trust. It may be, and indeed, probably was unusual that such a trust should be created; but I think there was no negligence in allowing the trustee to have the indicia of property in his hands. Mr. Lloyd said that it was not necessary for the purpose of the particular trust that Holyoake should hold the coupons; but the argument must go further and shew that the trusteeship was improper. I cannot say that there was anything improper on the part of the company, and I see nothing which takes this case out of the ordinary rule, that a trustee is entitled to the legal estate,

(1) Law Rep. 3 Q. B. 584.

and to possess the documents of title to the shares. It might be that the possession of these particular coupons by the trustee was necessary for the very purpose of creating his position as trustee.

HANNEN, J. I am of the same opinion. Mr. Lloyd has not denied that, in the case of an ordinary trustee, it cannot be imputed as negligence to the cestui que trust that the latter permits the trustee to have all the indicia of the property, and he is not estopped from asserting his rights as cestui que trust against one who deals with the trustee in respect of the subject-matter of the trust. But he said that this is a different case, because the trust ought never to have been created between the cestuis que trust and the banker as trustee. To our inquiry for reasons why this should not have been, his answers were loose and uncertain; and I cannot quite appreciate the grounds on which he puts his argument. He says the creation of such a trust was irregular and unusual; but surely, although both irregular and unusual, if not illegal, I can see no duty on the part of the company to attach to the coupons any statement that in this case they were cestuis que trust, and the holder trustee. In no case could a person in the position of C. Robson deal with property of this description without incurring the risk of the apparent owner ultimately proving to be a mere trustee, and in the present case it turns out that the person to whom the money was advanced was, in fact, a trustee, and the lender discovered subsequently that the cestuis que trust were not, as he might have supposed, ordinary ones, but the very company issuing the shares.

In what respect, however, was Robson or his widow damnified by that circumstance? He or she ought to have seen respectively that they were dealing with a person who, though apparently the owner of the shares, might be a trustee, and they must, therefore, bear the loss, for not taking due precautions.

QUAIN, J. I am of the same opinion. This is a case of a rivalry of equities, for the legal estate, having been acquired by Mrs. Robson after notice of the trust, may be put out of the question. Now, beyond all doubt, the property in dispute is that of the company. Then the defendants being the real owners,

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we are called upon to say whether we are to transfer the property from the real owners without any consideration. I always thought the cases in equity where such a course is adopted must be very strong. How can we take away these shares from the Shropshire Union Railways Company because their trustee has committed a fraud upon them? In the ordinary case of a trustee, in the possession of title deeds, and, therefore, the indicia of property, choosing to deal with them improperly, any stranger to the cestui que trust who obtained that property from the trustee could not hold the same against the real owner. As to that, *Baillie* v. *McKewan* (1) is an authority. There the trustee constituted for the benefit of the husband and wife was as trustee to remain in possession of the title deeds. He parted with them. He had no right to do so. How does this case differ from that? The only difference appears to me to be that in this particular case the cestuis que trust were the persons issuing the coupons. Now that is the point made by Mr. Lloyd, who says that the company ought not to have issued the coupons, and the fact of their having done so distinguishes this from the ordinary cases. Such appears to me, however, to be the only distinction between them. But is it a real one? I think not. I think paragraph 7 of the case ought to be taken into consideration, whereby it seems that "it is customary to issue stock coupons to the registered holders of all consolidated stock, and it is never the practice to set out or notice on the face of such coupons that the registered proprietors are trustees."

I see nothing irregular in allowing Holyoake to have these coupons—coupons issued not by the defendants, but by the London and North-Western Railway Company, and sent to Holyoake through the secretary of the Shropshire Union Railways Company. Looking at these facts, and looking at the custom to issue coupons to all holders of stock, I find no laches, no fraud, no negligence of the defendants which should postpone their interests to those of Mrs. Robson, for it would be a very strong case of negligence which would induce a Court of Chancery to transfer this property from the original owners to her.

Judgment for the defendants.

(1) 35 Beav. 177.

Error having been brought on this judgment:—

June 12, 13. *Horace Lloyd, Q.C.* (*Brooksbank* and *Eyre Lloyd* with him), for the plaintiff in error. The question stands as it would have done if, before the execution of the transfer by Holyoake, the company had filed a bill in chancery to restrain him from executing it. The plaintiff, no doubt, cannot insist upon the registration unless she was entitled to the transfer. If entitled, the subsequent notice will not affect her right to have it registered: *Dodds* v. *Hills.* (1) Here two equitable titles conflict; one, that of cestuis que trust, the other, that of a purchaser for value without notice of the trust. The first is earliest, but the second is, nevertheless, the best. Equity gives great effect to the title of a purchaser for value without notice. In *Colyer* v. *Finch* (2) Lord Cranworth lays down the principle on which the Court protects him: "It is not confined to the case of a purchaser for valuable consideration who has got the legal estate. . . . It may be that he has not the legal estate, but that will be quite unimportant as to a Court of Equity interfering or refusing to interfere." Priority of title is less cared for; in some cases the earlier, and in others the later, title has been sustained. The general principle is to be found in *Rice* v. *Rice* (3), where a vendor conveyed without receiving his purchase-money; the receipt of it, however, was indorsed on the deed, and the title deeds delivered to the purchaser, who then made a mortgage by deposit, and absconded; it was held, as between the vendor's lien for his unpaid purchase-money and the right of the mortgagee, that the possession of the title deeds and the fact of the indorsement of the receipt on the deed gave the mortgagee the better equity; and Kindersley, V.C., after commenting upon the incorrect modes in which the doctrine of priority is usually expressed, says: "To lay down the rule . . . with perfect accuracy, I think it should be stated in some such form as this: 'As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or, qui prior est tempore potior est jure;' . . . and," "a

(1) 2 H. & M. 424.

(2) 5 H. L. C. 905, 920.

(3) 2 Drew. 73; 23 L. J. (Ch.) 289.

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court of equity will not prefer the one to the other on the mere ground of priority of time, until it finds on examination of their relative merits that there is no other sufficient ground of preference between them. . . . In examining into the relative merits (or equities) of two persons having adverse equitable interests, the points to which the Court must direct its attention are obviously these: the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto." Then, adverting to the facts of the case before him, the learned judge said that the vendors, by delivering the deed indorsed with the receipt, "voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity;" and that "the mortgagee was guilty of no negligence," and "without the slightest obligation to go and inquire of the vendors whether they had received all their purchase-money. . . ." Those remarks are closely applicable to the present case.

[BRETT, J. Does not that judgment depend on the falsehood of the receipt? Suppose the deed had been handed over without the indorsement, would the decision have been the same? In the case before us there was no falsehood.]

But the company unnecessarily armed their trustee with certificates containing no mention of any trust, and have so lost the benefit of their priority, which is the last consideration: *Hunter* v. *Walters* (1) and *Dixon* v. *Muckleston*. (2) They were guilty of negligence: *Waldron* v. *Sloper*. (3) It is a fallacy to say that, because they must have handed over certificates to a trustee for a stranger, they were therefore justified in giving them to a trustee for themselves; especially after a previous malversation by him of which they were aware. On the other hand, the mortgagee has been guilty of no negligence, for even if he had gone to the offices of the company he would have learnt nothing. And he was not bound to get the legal estate conveyed to him: *Layard* v. *Maud*. (4) The certificates were indicia of property, and by them Holyoake was described as the proprietor of the stock: 8 & 9

(1) Law Rep. 11 Eq. 292.
(2) Law Rep. 8 Ch. App. 155.
(3) 1 Drew. 193.
(4) Law Rep. 4 Eq. 397.

Vict. c. 16, s. 11, and schedule A. But his title as a shareholder was perfect by the entry on the register: s. 8; and, therefore, he did not require to have certificates issued to him. The giving up of the certificates amounted to a statement by the company, intended to be acted upon, that Holyoake was entitled to the absolute ownership of the shares. The defendants are estopped from denying its truth: *In re Bahia and San Francisco Ry. Co.* (1); *Hart* v. *Frontino Gold Mining Company.* (2) The other side will no doubt rely upon *Baillie* v. *McKewan* (3); but in that case the cestui trust had not been guilty of negligence.

Sir J. B. Karslake, Q.C. (*McIntyre, Q.C.*, and *Joliffe* with him), for the defendants. First, as Holyoake was a trustee and the defendants cestuis que trust, the cases cited which arose between equitable incumbrancers do not apply; secondly, the transfer to Robson was a breach of trust; thirdly, the Court will not grant a mandamus to compel the registration of a legal transfer executed after notice of a fraud. There was nothing illegal or improper in creating this trust. There are, doubtless, numerous cases, like those already referred to, where an equitable assignment is made first to one person and then to another, and the latter by getting in the legal estate, as "tabula in naufragio," is preferred; but no similar case has been cited between a cestui que trust and a third person deriving title from the trustee. The plaintiff by getting the legal estate acquires no new right in equity: *Rooper* v. *Harrison.* (4) Moreover, she obtained it after notice of the breach of trust. In *Sharples* v. *Adams* (5) it was held that the priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all. *Baillie* v. *McKewan* (3) is in point. There, one in whom a lease was vested deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice of the fact that he was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate. Lord Romilly, M.R., held that the cestuis que trust had priority over the bankers, and that the trustee "could not by depositing the deeds of property belonging

(1) Law Rep. 3 Q. B. 584.
(2) Law Rep. 5 Ex. 111.
(3) 35 Beav. 177.
(4) 2 K. & J. 86.
(5) 32 Beav. 213.

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to another create in that depositee an interest which he did not himself possess." Negligence on the part of the cestui que trust will not deprive him of his right, unless there has been gross negligence amounting to an estoppel: *Dixon* v. *Muckleston*. (1) A trustee is entitled to hold the title deeds of the trust property. So, Holyoake had a right to possess the coupons, but not to deal with them. If the company had recognized the transfer and registered it, then the case would have been different. In *In re Bahia and San Francisco Ry. Co.* (2), which was decided upon the doctrine of estoppel merely, it was held, that the company, if they had not issued new certificates to the transferees, might have declined to register the transfer. Robson was himself guilty of negligence. He should have given notice to the company of the deposit of the shares with him; he rested satisfied with a mere memorandum of deposit. In *Dodds* v. *Mills* (3) the defendant took a formal transfer before notice; that fact distinguishes that case from the present.

H. Lloyd, Q.C., in reply. An equitable mortgagor is trustee for his mortgagee, and therefore the cases cited for the plaintiff upon the question of priority are in point. The word negligence is somewhat loosely used in *Baillie* v. *McKewan* (4), by the Master of the Rolls. It means not doing what one might do, or not doing what one ought to do. No reason has been suggested for allowing the trustee to have the coupons; and there was, on the contrary, an obvious disadvantage in letting him hold them.

[BRETT, J. Suppose an ordinary cestui que trust handed over certificates of shares to her trustee, would her right have been postponed to that of an equitable incumbrancer without notice of the trust? If it would not, then the prosecution must rely on the distinction that the company themselves were cestui que trusts.]

It was negligence to issue such indicia of property at all, under the circumstances. But there was no negligence by the mortgagee.

Cur. adv. vult.

June 20. The judgment of the COURT (Kelly, C.B., Martin

(1) Law Rep. 8 Ch. App. 155, at pp. 160, 161.

(2) Law Rep. 3 Q. B. 584.

(3) 2 H. & M. 424.

(4) 35 Beav. 177.

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and Cleasby, BB., Brett, Grove, and Denman, JJ.,) was delivered by

CLEASBY, B. The facts being stated in the form of a case, it is unnecessary to re-state them. All that is required is to give correctly the history of the shares which are the subject of inquiry. Previous to the passing of the Shropshire Union Railways and Canal Act in 1846, the Birmingham and Liverpool Junction Canal Company had been incorporated with the Ellesmere and Chester Canal Company, and the shares of the former were exchanged into shares of the latter company. By the Act referred to, the shares of the Ellesmere and Chester Canal Company were exchanged into shares of the defendants' company. It appears by par. 3 of the case that, after the formation of the defendants' company, ninety-nine shares in that company, of 37*l.* 10*s.* each, were registered in the names of Earl Powis and G. Holyoake (who were the directors of the company), and that they held them only as trustees of the company. We have no distinct statement as to how this came to be done. All that is stated is, that these shares were so registered in lieu of shares which had been originally Birmingham and Liverpool Canal shares. Surmises may be made as to the manner in which this state of things arose. But it is enough to say that there is nothing in the case to warrant the inference that there was anything illegal, as was suggested, or even improper, in the relation of trustees and cestui que trust between Earl Powis and G. Holyoake and the company, so as to prejudice the present position of the defendants. Afterwards Earl Powis died, and the shares were changed into stock; and it may be taken that G. Holyoake became the registered holder of 3712*l.* 10*s.* stock, as trustee for the company, he then being one of the directors of the company. This was in 1847. In that year the Act was passed authorizing the leasing of the line to the London and North-Western Railway Company; and the Shropshire Union Railway was to be managed by a joint committee of eight members of the Shropshire Union and eight members of the London and North-Western Railway Company. Holyoake became and continued one of the committee of management. This is only noticed for the purpose of observing that the trustee, not being a stranger without any interest or authority, was a person who would have certain influence and authority

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in the affairs of the company so as to have greater facilities in acquiring the means of committing a fraud, as in fact he afterwards did, by being able to obtain certificates for the purpose which will be mentioned hereafter.

Up to this time matters proceeded with regularity. No certificates were issued to Earl Powis and G. Holyoake or to G. Holyoake. We think that a person in the position of G. Holyoake had no right or title to certificates. A person who is the holder of shares in such a company may demand certificates of shares from the company (by s. 11 of the Companies Clauses Consolidation Act, 1845), and becomes entitled to them as a matter of right; and they are conclusive evidence of his title against the company: *In re Bahia and San Francisco Ry. Co.* (1), *Hart* v. *Frontino Gold Mining Company.* (2) A holder of shares may, no doubt, compel the delivery of the certificates, and may therefore deal with and use them so far as he can, not of course as passing the property (which must be by deed), but in a manner and for purposes similar to those available by persons who lawfully hold title-deeds to real property. But, though ordinary title-deeds and certificates of shares are made available for advances, there is a great difference between the two cases. The deposit of ordinary title-deeds involves always a consideration of the title of the person depositing, and that title has to be regularly investigated before the transaction is completed. But that is not the case with the deposit of certificates with an engagement to transfer, because the certificates themselves shew conclusively that the person depositing is the owner of the shares; since the shares could not be transferred without the certificates being given up. The fact of depositing together with the agreement puts out of question the idea of a trusteeship, and further inquiry would defeat the object of such a transaction, even if there were proper persons to make the inquiry of, which, as far as we can see, is not the case. But it is obvious to us that a trustee for the company had no right to demand from the company such certificates, and we can see no proper object for which they could be required. The giving such documents is, we think, an improper act, because it makes the trustee appear to be one thing when he really is another, that is, appear to be the real owner when in

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 5 Ex. 111.

reality he is not so, and gives him indicia of property which he does not possess and which are therefore in effect false. And it is plain from the statements in this case that for twelve years, that is, from 1847 to 1859, no certificates were given out, and then only for a particular purpose.

It is impossible to recapitulate all the transactions connected with this stock found in paragraphs 5D to 9; but the transactions may be correctly summed up, in our opinion, by saying, the certificates were in 1859 irregularly and improperly given to G. Holyoake for an illicit purpose, or at all events for indirect purposes of their own; and that, this possession of the certificates giving G. Holyoake the apparent character of real proprietor, enabled him to continue a system of irregularities and improper dealing with the shares, some of which irregularities were known to the defendants (as for instance, that 3000*l.* Shropshire Union stock had been, without any authority, converted into London and North-Western stock); and that eventually he regained his original position of registered holder of the 3712*l.* 10*s.* stock, with the possession of the certificates or indicia of property to which he was not entitled. The certificates, being once delivered out, would be delivered up and again issued out upon each transfer; but all is traceable to the first improper act, viz. the giving out the certificates in 1859, so as to enable a transfer to be made, and to give Mr. Tootal an apparent title to a sufficient number of shares. This being so, the conduct of the defendants,—improper, as we think, in any case, but especially imprudent in relation to a man who had acted like Mr. Holyoake,—enabled him to occupy the position of a holder of shares, and so to deal with them in the ordinary way; and it appears to us to follow (without entering into all the nice questions of equity to which the learned counsel referred) that the defendants cannot be suffered now, as against a person who bonâ fide acted upon the apparent title which the defendants gave him, to question the complete legal title of the prosecutrix, by reason of any equity arising from the ultimate transfer of the shares being a breach of trust known to her.

We think that the defendants are, under the circumstances of this case (as between them and the prosecutrix), the persons who must suffer for the consequences of a breach of trust of G. Holy-

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oake, which consequences are attributable to their giving him, or rather, perhaps, negligently allowing him to obtain, he being a director, indicia of property which he did not possess: *Waldron* v. *Sloper* (1); *Rice* v. *Rice*. (2) It is unnecessary to repeat at length here the very able judgments of Vice-Chancellor Kindersley in these cases. But the passages from page 200 to the end of the first report, and from p. 80 to the end of the second report, fully justify the conclusion at which we have arrived. They deal with the effect to be given to the conduct of the parties in dealing with a case of this description. They also deal with the effect to be given to the possession of the indicia of title; as to which the case of *Layard* v. *Maud* (3) may also be referred to. If the defendants had properly given the certificates (as in the case of a trustee for a third person), then a question of equity would arise between the transferee from the trustee and the cestui que trust, and until the transaction was complete by transfer, it was contended, upon the authority of the case of *Baillie* v. *McKewan* (4), that the equity of the cestui que trust would prevail, being both prior in tempore and potior in jure, the two equities being equal. But in that case the deeds deposited by the trustees were documents or indicia of property which were properly left in his possession by the cestui que trust. It is clear that a trustee who may be bound to defend the possession of land is properly in the possession of deeds which shew his title. But there is only an apparent similarity between such a case and the present, and the consequence of this apparent similarity is that we had a considerable argument and reference to many authorities; but the great feature of the present case is the improper handing over by the cestui que trust himself of the indicia of property which imported that, as against the company (the cestui que trust in this case), the holder had an indefeasible title; and, Mr. Robson having acted upon them as such, the defendants cannot under the circumstances of this case separate their character of company from that of cestui que trust, and say that, though the certificates are conclusive against them as company, they can defeat them in their character of cestui que trust. We have not omitted to consider fully an argument which was much

(1) 1 Drew. 193; 23 L. J. (Ch.) 289.
(2) 2 Drew. 73.
(3) Law Rep. 4 Eq. 397.
(4) 35 Beav. 177.

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pressed, and properly, viz. that this is not a question between two incumbrancers, which has generally been the case in the authorities referred to, but a question where there has been a breach of a direct trust by the person depositing the deeds and making the transfer. The answer to that argument is that the conduct of the cestui que trust in this case deprives him of the benefit of the distinction. In *Dodds* v. *Hill* (1) the deposit was of such certificates as we are now dealing with, and both deposit and transfer were breaches of direct trusts; but the Court held that the transferee was entitled to be registered and to have his title completed. We may notice that in that case the certificates had been originally given out in the names of two persons, that is, in the name of the person depositing and of another no doubt dead, and it was held that this fact, which no doubt makes a trusteeship probable, was not enough to put upon inquiry. It is true that in that case the transferee was not aware of the transfer being a breach of trust till after the transfer, which is not the case here. But the case shews that a title acquired by breaches of trust may, after the breach of trust, be completed so as to be effectual in a court of equity. And then we have in this case the conduct of the defendants which places the prosecutrix in as favourable a position. The contest between the parties may be briefly stated thus: The plaintiff produces her regular deed of transfer, and claims to be registered. The defendants say, "No, we have an equitable interest as cestui que trusts, which takes away your right to be registered." The prosecutrix answers, "I have also an equitable right, by advance of money and deposit of indicia of property with engagement to transfer, and your conduct in relation to your equitable interest disentitles you to set up your equitable interest against mine." And the prosecutrix might perhaps add, "And my position is better than yours because I have also got the legal estate." We have not considered particularly the effect to be given to the possession of the legal interest, because in this judgment it has been thought better not to rely upon that fact, by reason of that interest being acquired after the real position of G. Holyoake as trustee was known. But, if that fact had been relied on, it would have been necessary to consider how far that knowledge was decisive in a case where the legal estate

(1) 2 H. & M. 424.

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was acquired under a contract from a person who had had the full benefit of that contract and upon whom it was obligatory. Certainly the earlier authorities place very little restriction in such cases upon the mode in which the legal estate is acquired. We think the prosecutrix's answer is made good by the facts of this case.

There is no authority for saying that the mere fact of advancing money to a banker upon the deposit of such certificates, with engagement to transfer, though made without further inquiry, amounts to negligence so as to destroy or abridge the equitable title which is acquired, or that the omission to insist upon a transfer for a considerable time has of itself that effect. See Vice-Chancellor Kindersley's judgment in *Rice* v. *Rice*. (1)

There is only one other question raised in argument, viz. the finding in paragraph 12A in the case that no notice was given of the first deposit, and the consequence of the omission to give notice was, that a further advance was made, and also that the defendants were prevented from making inquiry and rectifying their position, and that the prosecutrix, having been guilty of this omission, loses the advantage of any position which she would have otherwise been entitled to.

7 H.L.C. 504 We think there was no obligation to give such a notice. The case finds, and no doubt correctly, that it is frequent to give such a notice. But this is accounted for by its being necessary for a particular object, viz. to prevent the shares from going to the assignees in the case of bankruptcy, as being in the order and disposition of the bankrupt. We cannot be ignorant of the fact that those loans upon deposit are resorted to (instead of transfers and mortgages) to prevent the credit of a person from being injured by its being known that he is raising money. Secrecy is a necessary part of such an arrangement when a banker borrows money upon a deposit of documents, and (except so far as regards the operation of the bankruptcy law) the allowing the advances and deposit to be concluded cannot affect the rights of the parties.

For the reasons given, we think that, in the present case, the legal title of the prosecutrix is complete to have her name entered

(1) 2 Drew. at p. 84.

on the register, and that there is no equitable interest of the defendants themselves which can be set up against it.

Therefore the judgment of the Court of Queen's Bench must be reversed, and a peremptory mandamus awarded.

Judgment reversed.

Attorney for prosecution: *Pulbrook.*
Attorney for defendants: *J. Philpot.*

THE MERSEY DOCKS AND HARBOUR BOARD, APPELLANTS; THE OVERSEERS OF BIRKENHEAD, RESPONDENTS.

June 4.

Poor-rate—Rating of Docks and Warehouses, &c., connected therewith.

The appellants were the owners and occupiers of docks, and of warehouses, workshops, sheds, &c., connected with their docks, and were rated to the poor-rate separately for each, Nos. 1—8 being the warehouses, &c., No. 9 the docks. They were compelled by their Act of Parliament to keep up the docks, and the working expenses, &c., of the subject of the rate, taken as a whole, necessary to maintain the property in a condition to produce the income derived from it, exceeded the income, the chief expense being the keeping up the docks and basin No. 9. The premises in the other eight items were each capable of separate beneficial occupation apart from their connection with the docks; but each was enhanced in value by reason of its proximity to and connection with the docks:—

Held, that the separate rating of items 1—8 was right; for that, as each subject was capable of beneficial occupation, it was therefore rateable, notwithstanding its connection with the docks, which, as a whole, produced no profit; and that they ought to be rated at the enhanced value, which was what a tenant from year to year would be expected to give for them.

CASE on appeal under 12 & 13 Vict. c. 45, s. 11.

2. In June, 1872, a rate of 2*s.* in the pound for the relief of the poor of the township of Birkenhead was duly made and allowed.

3. In the part of the rate relating to the property of the appellants in the township, the appellants are named in the first and second columns as owners and occupiers respectively; and the property is rated separately under the following nine items:—"Description of property.—1. Two new warehouses, &c., on the margin of the Morpeth Dock. 2. Workshops, offices, lime-kiln No. 1 adjoining, with the mortar-mill and machinery. 3. Lime-kiln and mortar-mill No. 2 and machinery. 4. Graving-docks with

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steam-engines and machinery for working same. 5. Chain, cable, and anchor testing works, and the machinery for working same, and yard adjoining, containing 3378 yards of land. 6. Four new warehouses on margin of great float. 7. Warehouses and the hydraulic cranes for working the warehouses, engine-houses, accumulators, and steam-engines for working the hydraulic cranes and warehouses. 8. Timber and guano sheds. 9. Morpeth and Egerton Docks and such of the great float and low-water basin as is lying within the township, with the quays, coal tips, weighing-machines, cranes, railways, and land not elsewhere charged."

4. The appellants gave notice of objection to the assessment committee of Birkenhead Union who confirmed the assessment, and the appellants thereupon gave notice of appeal to the quarter sessions of the county of Chester, by whom judgment is to be entered in conformity with the judgment of this Court.

5. The appellants are a corporation incorporated and regulated by and holding docks and other property (including the subject of the rate) under various Acts of Parliament, all or any of which may be referred to and are to be taken as part of this case.

6. The docks and other property so held by the appellants are situated partly on the Lancashire and partly on the Cheshire side of the River Mersey. The property situated on the Cheshire side of the river consists of the property in the township of Birkenhead, which is the subject of the present rate, and certain other similar property in the adjoining township of Seacombe.

7. The working expenses and average annual cost of the repairs, insurance, and other expenses necessary to maintain the premises (the subject of the rate), taken as a whole, in a condition to produce the income derived therefrom, exceed the amount of such income. The largest part of such expenses is attributable to the repairs, maintenance, and other expenses of the docks, basins, and other works mentioned in the ninth item of the rate, but some part of such expenses is attributable to the respective premises mentioned in the other eight items.

8. It is admitted for the purposes of this case, that the premises respectively comprised in the first eight items of the rate are respectively capable of separate beneficial occupation apart from the proximity to and connection with the docks and other pre-

mises comprised in the 9th item of the rate; and would be so capable if the docks and other premises comprised in the 9th item were not in existence. It is further admitted, for the purposes of this case, that the premises comprised in the first eight items are respectively enhanced in value by reason of their proximity to and connection with the docks and other premises comprised in the 9th item.

9. It is admitted by the respondents that the expenses of maintaining the docks and other premises comprised in the 9th item exceed any value derivable from them, and, therefore, that the docks and other premises mentioned in that item are not at present the subject of a profitable occupation, and that the rating thereof cannot be maintained, and that this item is to be struck out of the rate.

10. For the purposes of this case the description of the property in the rate, and the rateable values of the premises respectively comprised in the first eight items, as enhanced by their proximity to and connection with the docks and other premises comprised in the 9th item, may be taken to be correct as given in the third paragraph of this case.

The questions for the opinion of the Court are:—1. Whether the premises respectively mentioned in the first eight items of the rate are properly rated separately and apart from the docks and other premises mentioned in the 9th item. 2. Whether, if the premises in the first eight items are properly rated, separately and apart from the docks and other premises mentioned in the 9th item, they are properly rated as enhanced in value by their proximity to and connection with the docks and other premises mentioned in the 9th item; and if not, how otherwise the first eight items ought to be rated.

Manisty, Q.C. (*Crompton* with him), for the appellants. The contention of the appellants is, first, that the whole of the nine items being occupied for one common purpose must be treated as a whole, and that, as it is not, as a whole, occupied at a profit, no part of it can be rated. Secondly, that, if the first eight items are to be treated as separately rateable, then they ought not to be rated at a value enhanced by the proximity to or connection with

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the 9th item, the docks themselves, which part, it is conceded, cannot be rated. The statutes under which these docks were constructed and occupied were before the Court in *Mersey Dock* v. *Liverpool* (1), and by s. 50 of the Act of 1857 (par. 11 of that case), all the docks and works are to be deemed to constitute one estate, under a uniform system of management. In that case it was held that the docks on the Liverpool side were not to be considered as one with the Birkenhead docks for the purpose of rating; but the judgment seems to treat the system of docks on each side as one.

[BLACKBURN, J. No such point was raised in that case; it was not before the Court to say whether all that was on the Cheshire side was or was not one rateable subject-matter.]

It is submitted that that is the result of the legislation; and the Chief Justice says that, looking at the Acts, it must have been the intention that the two estates should be separately rated; and thus the Liverpool estate was held rateable because as a whole it was beneficially occupied. And so treating the Cheshire estate, it is not rateable according to the finding in par. 7, that, taken as a whole, the working and necessary expenses exceed the income. There is no direct authority on the point; the case nearest to the present is *Reg.* v. *Great Western Ry. Co.* (2) There the company worked two branches in connection with the main line, there being a profit on the whole but a loss on each of the branch lines; in rating the main line, it was held in a considered judgment of the Court, in effect, that the three lines must be treated as one, and the parochial principle must be applied. So here the occupation of the first eight items is ancillary to the 9th item, the docks; and the whole being occupied at a loss there can be no rate upon any part of it.

[BLACKBURN, J. Paragraph 8 finds that the first eight items, such as warehouses, &c., are capable of a separate beneficial occupation. Though very probably many of them would never have been erected but for the docks, yet if the docks were filled up to-morrow these warehouses would still let.]

No doubt this finding is against the appellants. But the object of the Acts of Parliament must be looked at, which was that the docks should be maintained and kept open, and the warehouses,

(1) Law Rep. 7 Q. B. 643. (2) 6 Q. B. 179.

&c., were merely built as ancillary to this one purpose. Secondly, if the eight items are to be treated separately, it is difficult to say, that they have not been properly rated.

[BLACKBURN, J. There is really but one point. Suppose a canal occupied and carried on at a loss, still the other property in the neighbourhood would be rated at the enhanced value from the proximity to the canal, as long as the canal was carried on, though at a loss.]

Holker, Q.C. (*Kenelm Digby* with him), for the respondents. The items from one to eight are separately rateable. In *Guest* v. *East Dean* (1) it was held that buildings, &c., occupied in connection with a non-rateable subject matter, an iron mine, were yet rateable; and that the way to ascertain the rateable value was to assume the mine and surface to be in different hands, and then to calculate what the occupier of the mine would give for the use of the surface with the buildings upon it.

[QUAIN, J. There the mine was not rateable, but the whole concern was profitable.]

The question is, whether the two tenements which are sought to be treated as separately rateable are so intimately connected with each other as not to be divisible. In that case it was held, that though occupied together, they could be so treated; and in giving judgment the Chief Justice refers to *Rex* v. *Bilston* (2), in which it had been held that tramways and other matters on the surface were not rateable by reason of their connection with a non-rateable subject, the iron mine, and he dissents from that view, and Blackburn and Mellor, JJ., concurred.

[QUAIN, J. There the mine was not rateable at all. Here the docks would be rateable were they not occupied at a loss.]

The ground of the decision was that the tenements on the surface were not so intimately connected with the mine as not to be separable for the purpose of rating. So here the finding in par. 8 is to the same effect. *Rex* v. *Lower Mitton* (3) is also in point. In *Birmingham Canal* v. *Overseers of Birmingham* (4) it was held that wharves, reservoirs, &c., occupied in connection with a canal, were rightly assessed separately and at the enhanced value, which

(1) Law Rep. 7 Q. B. 334.
(2) 5 B. & C. 85.
(3) 9 B. & C. 810.
(4) 19 L. T. (N.S.) 311.

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is the second point. On this latter point *Reg.* v. *Great Western Ry. Co.* (1) is a direct authority as to stations on a railway. It is to be observed that under their Acts of Parliament the board are entitled to charge separate rents or dues for the use of the warehouses, &c., and they may let them. This, coupled with the finding in par. 8, is conclusive in favour of the respondents. On the second point, *Reg.* v. *West Middlesex Waterworks* (2) may also be cited, where it was held that the company were to be rated for buildings, &c., at the value enhanced by their capability of being used in connection with the mains.

Manisty, Q.C., in reply. None of the cases cited are expressly in point on the first point. In none of them was the particular subject of occupation, taken as a whole, non-rateable by reason of being occupied at a loss.

BLACKBURN, J. I think when we look at this case and consider carefully the statute, the matter seems clear enough. The Parochial Assessment Act requires that all rates should be made upon the rent for which it might be reasonably expected the property would let from year to year. Now, it does happen sometimes that there is property which is of such a nature that it can only be practically occupied by one and the same person. The case may be supposed, for example, of a theatre, which happened to be erected upon ground, one half of which belonged to one person, and the other half to another person. The theatre, so built, could practically be let to only one occupier, consequently, in determining what would be the rate upon it, applying the principles of the Parochial Assessment Act, you would have to consider what would the whole let for, and then apportion the rent according to the two portions. It very seldom happens that two portions of one indivisible subject belong to different proprietors; but that which is the same thing constantly happens, namely, that one of them is in one parish or township and the other in another parish or township. Then it is to be treated exactly as if it were about to be let to one occupier, in order to see what would be the rent which could reasonably be expected to be given by that occupier for the whole,

(1) 15 Q. B. 1085; 21 L. J. (M. C.) 84.

(2) 1 E. & E. 716; 28 L. J. (M. C.) 135.

and then apportion that between the two different portions of the property which lie in different townships; just as you would apportion the gross rent if it happened that the land had got into the possession of two different proprietors, and you had divided the rent between them. When that is the case you must consider what the whole would let for, and it being the case that one portion is indispensable towards obtaining the whole of the profits which partly come from the other, you would take the two together.

In the present case we have not anything of the sort, so far as I know. The Mersey Docks and Harbour Board have got an estate consisting partly of a dock, which they are under obligation to keep up, by which they actually lose money, but the estate consists partly of other property by which they do not lose money. Why are you to take the whole as one, and suppose that there is a tenant who is the only person who can occupy the whole—a hypothetical tenant—who, in settling the rateable value, you are to take was under the obligation of occupying the whole as one, that is who occupies the dock as well as the adjuncts? Of course, if you get no rent at all then there would be no rate. But here the Act of Parliament does not say that the warehouses and docks are all to be occupied together. The words of the Act do not put it in that way at all; and the nature of the thing does not do so, because it is quite obvious to any one who considers it for a moment that a warehouse may be, and in fact in many cases is, let to the tenant who occupies it, wholly irrespective of keeping up the docks at all. I observe that it is stated in the 8th paragraph of the case: "It is admitted for the purposes of this case, that the premises respectively comprised in the first eight items of the rate are respectively capable of separate beneficial occupation, apart from the proximity to and conjunction with the docks and other premises occupied in the 9th item of the said rate, and would be so capable if the docks and other premises comprised in the 9th item were not in existence." Taking it in that way, how can we possibly say that the hypothetical tenant who is to fix the rate must be supposed to be the hypothetical tenant, not merely of the eight items (which the case has found are capable of beneficial occupation, quite apart from the docks, even if the docks were not in existence), but also taking upon himself the burthen of using and keeping them up. It seems

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to me, when you look at the statement in the 8th paragraph of the case, that that is out of the question. It follows that the first question ought to be answered in favour of the respondents.

If the appellants are rateable at all in respect of these eight items, then arises the second question, whether the property is to be taken as enhanced in value in connection with the docks. It seems to me that it must be so taken. If you were letting one of the warehouses (supposing the docks to be already let) to the highest bidder, the person who offered the highest rent would take into account the proximity of the warehouse to the docks, and would not ask how the docks were to be managed, or whether the rates to be received were more than the rent of the docks or less; he would not inquire into that at all; he would say, I agree to give such a rent for the warehouse because it is close to the docks, and I expect to make a trade from it. In the same way, if he were about to become the occupier of a public-house adjoining a large factory which employed a great number of hands, from whom he expected to get a great custom, in that case he would not inquire whether the factory was worked at a profit or a loss: for as long as the factory was worked the public-house would be of value, owing to the custom of the people who worked at the factory. So with regard to a shop in a public thoroughfare, the occupier would never inquire what it cost to keep up the road. A higher rent is paid for a shop if it is in a good street, as it is enhanced in value from that circumstance; but if, by any chance, things were changed, and the street were blocked up, the value of the shop would be lessened. So here, I think, the value of the eight items is to be taken as the value which a tenant would give for them, if the docks are de facto kept up, without inquiring whether the docks are a damnosa hereditas. With regard to the interest of the Mersey Dock and Harbour Board in these warehouses, &c., it is enough to say that the value of the occupation is enhanced to that extent.

Therefore, my opinion is that both questions ought to be answered in favour of the respondents.

QUAIN, J. I am of the same opinion. I can find no authority to shew that property of this kind is not rateable in the way in which the overseers propose to rate it merely because the

Mersey Docks and Harbour Board choose to carry on a losing concern. This is a losing concern in the hands of the present occupiers; but they choose for some purpose or other to carry it on. That may be so; but I do not understand that that portion of the property which would let to a tenant within the meaning of the Parochial Assessment Act is not rateable. The question is, what would a tenant give for these warehouses by the year, making the usual deductions. The case distinctly finds that such a tenant could be found; and that there would be a rateable value for these warehouses and other matters comprised in Nos. 1 to 8 in this list. Therefore, it seems to me that upon that ground these items are rateable. The fact that they belong to a concern which as a whole is carried on by a Dock Company at a loss is no answer to the question as to their rateability.

Then with reference to the other point, whether they are to be taken at the enhanced value, I cannot conceive how there can be any doubt upon that subject. That is involved in the first question. It seems to me that both points come in the long run to the same thing. The moment you decide that they are separately rateable you must take them as they are—as they could be let from year to year. You cannot take into consideration, in order to get at the rateable value, the fact that the board choose to keep up these docks at a loss. As long as they choose to keep up the docks at a loss, the warehouses must be rated at their enhanced value, whether they are let with the docks or not.

For these reasons, I think that judgment must be given for the respondents.

ARCHIBALD, J. I am of the same opinion. It appears by the case that all the separate properties are, by the effect of the Act of Parliament, under one management. But I think there is very little difference between the case where that is brought about by an Act of Parliament, and a case in which a party chooses to carry on a concern of this kind, which, on the whole, may be a losing concern, provided there are portions of it which, although they may be adjuncts to the whole property, yet are capable of being beneficially occupied by separate tenants. There may be, no doubt, conceivable cases in which the whole property may be so

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bound together as to render it impossible that one part can be let without another, and that there can be any separate letting. There may be other conceivable cases in which the adjuncts of the property are not lettable in any way, and therefore, if one part of the property is not rateable you could not rate the other. Here the fact is expressly found in the 8th paragraph of the case that these particular properties are capable of a separate beneficial occupation apart from their proximity to or connection with the docks. I think, therefore, that that takes the subject-matter entirely out of the position of being so connected that you must take the whole together. I think, therefore, applying the principle of the Parochial Assessment Act, that, as each of these items may have a separate tenant found for them, they are separately rateable. Then as to the extent to which they are rateable, which is the second question, I also agree that they must be rated at the enhanced value in consequence of their proximity to the docks.

Upon these grounds therefore, I think that the judgment should be for the respondents on both points.

Judgment for the respondents.

Attorneys for appellants: *Venn & Son, for Squarey, Liverpool.*

Attorneys for respondents: *Chester, Urquhart, Bushby, & Mayhew, for J. Townsend, Liverpool.*

June 17.

STOCKS *v.* ELLIS.

Evidence—Interrogatories and cross Interrogatories—1 Wm. 4, c. 22, s. 4—Questions tending to discredit Witness and deter him from answering.

Where interrogatories are administered on a commission to be executed in a country out of the jurisdiction of an English court, the Court, in its discretion, will disallow such interrogatories as may deter a witness from giving evidence before the commission.

After a commission has been granted under 1 Wm. 4, c. 22, s. 4, the Court will, before its execution, disallow any cross interrogatories which in their discretion they may think improper.

RULE calling on the plaintiff to show cause why certain cross interrogatories numbered 1 to 8 should not be struck out as being irrelevant.

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The action was brought against the defendant for unskilfully and improperly spinning certain yarn.

The plaintiff had obtained a commission under 1 Wm. 4, c. 22, to examine Thomas Ashworth, of Lowell, Massachusetts, as a witness, and had administered interrogatories to him for the purpose of shewing that the yarn was negligently spun. The defendant administered cross interrogatories. The first eight which were objected to were as follows:

1. When did you leave Bradford, Yorkshire, England?

2. Did you leave Bradford to go to America?

3. Had you not a wife and ten or twelve, or how many children living at that time?

4. Had you, up to that time, lived with them at Bradford?

5. When you went to America, did you leave your wife and children ignorant of your departure and unprovided for, and did you induce a woman, who was not your wife, and who had a husband and children living, to accompany you to America, or how otherwise?

6. How have you been employed since you arrived in America?

7. What wages are you now earning per week, and what is about the average amount per week you have earned since your arrival?

8. Have you sent your wife any, and what portion of such earnings?

Waddy shewed cause. The plaintiff cannot, at this stage, object to the cross interrogatories; he must wait until the commission is executed, and when the interrogatories are put in evidence at the trial he should apply to the presiding judge to strike out those questions and answers which are irrelevant. Sect. 4 of Wm. 4, c. 22, confers no power on the Court to deal with cross interrogatories; that section is confined to the examination, and does not extend to the cross-examination of witnesses.

[BLACKBURN, J. The examination of witnesses includes cross-examination. The words of s. 4 enact that the Court may "order a commission to issue for the examination of witnesses on oath . . . and by the same or any subsequent order, give all such directions

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touching the time, place, and manner of such examination, as well within the jurisdiction of the Court wherein such action shall be depending as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just." I think, under these concluding words, the Court has power to entertain this application.]

The first eight interrogatories are admissible. They are relevant as relating to the credit of the witness. A man, who leaves his wife and children chargeable to the parish and elopes with a woman who is the wife of another man, can scarcely be considered an honest man whose testimony is above suspicion, and in a conflict of evidence his testimony would hardly carry any weight.

Edward Wilberforce, in support of the rule. These interrogatories are objectionable, particularly the fifth and eighth. The commissioners to whom the commission is issued must take down the answers to the interrogatories, and cannot in any way interfere for the protection of the witness. If at nisi prius questions are put to annoy a witness the judge will interfere; and, as in the present case, there is no other mode of protecting a witness, the Court, if they can see that these questions are put for the purpose of annoying the witness, and are irrelevant to the question in dispute between the parties, will disallow them. The Court clearly have jurisdiction to entertain this application.

[BLACKBURN, J. We will consult with the other judges before deciding the case.]

BLACKBURN, J. We have, during the short adjournment of the Court, considered this case, in which Mr. Wilberforce has obtained a rule nisi to disallow some cross interrogatories proposed to be administered under the following circumstances: There being a witness whom it was desired to examine as to whether some yarn had been improperly spun, the defendant exhibits cross interrogatories, tending to shew that the yarn was properly spun, but commencing with eight questions, the substantial purport and effect of which was to ask whether or not the witness had eloped with another man's wife, and deserted his own wife and children, whom he was bound by law to support. The objection made to these interrogatories was that they were impertinent and irrelevant.

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We have been obliged to decide the question to-day, or our decision would be of no use; we have, however, taken an opportunity of consulting some of the other judges on the point, and we have no doubt that when evidence is proposed to be admitted under a commission, the Court has power to exercise control over the matter, and to see that no interrogatories shall be asked which the Court, at the trial, might refuse to allow to be put to the witness. The great difficulty is in saying whether these cross interrogatories are impertinent, and not such as ought to be administered. It is clearly laid down that questions, going to the credit of a witness, the answers to which will reasonably lead the tribunal to say, "When the witness has admitted these facts we distrust his testimony," may be asked of him. The limit to this kind of questioning is, in practice, that the presiding judge appeals, ad verecundiam, to the counsel to regard the pain caused to the witness, and not to annoy him unnecessarily. And that prevents any great abuse of the freedom of cross-examination. Now, looking at the nature of the subject, I do not think we can positively say that these interrogatories would be inadmissible questions, because the answers thereto would go more or less to the credit of the witness. But the other view is: Here is a witness in a foreign country, who cannot be reached by process to compel him to come and give evidence. Here are questions the effect of which would tend to disincline him to come forward; and, if administered with the object and view of deterring the witness, and for the purpose of annoying him and keeping him away, it is quite clear that they ought not to be allowed.

Now it is very plain that, inasmuch as the legitimate purpose of discrediting the witness is very small, and the certain effect of deterring him is very great, exercising the discretion vested in us, we must say that these interrogatories are not for a legitimate purpose, and ought to be disallowed.

ARCHIBALD, J. I am of the same opinion. We must consider the fact that these interrogatories are going out to America, and that the witness cannot be compelled to answer them. I think there would be direct injustice done, and the effect would be to prevent him answering, if the questions allowed were of such a

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character as to intimidate the witness; and unless it be quite clear that the questions are such as ought to be put, we, in the exercise of our discretion, do right to disallow them. I quite agree that the effect of these interrogatories, as tending to discredit the witness, is very inappreciable, and their direct effect to prevent him coming forward very great. Therefore they should be disallowed.

Rule absolute.

Attorneys for plaintiff: *Johnson & Weatheralls, for Rawson. George & Wade, Bradford.*

Attorney for defendant: *J. W. Sykes.*

June 3.

KELLOCK *v.* ENTHOVEN.

Contract of Indemnity—Liability of Transferee of Shares in respect of Future Calls—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Proof of Debt—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 153—*Contingent Liability.*

The plaintiff, a holder of certain shares in a limited company, transferred them to the defendant, who transferred them to M. The company was ordered to be wound up, and a call of 40*l.* a share was made on the contributories in Class A, being the existing members, amongst whom M. was placed; these, including M., being unable to pay, the plaintiff and defendant were placed upon the list of contributories in class B, as past members, under s. 38 of the Companies Act, 1862, and were ordered in March, 1869, to pay a call of 40*l.* per share. The defendant had executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly registered in December, 1867. The liquidators of the company proved for the amount of calls against the defendant's estate, but no part was paid; and the plaintiff, having paid a sum in compromise of the money remaining due on the shares, sued the defendant for the amount:—

Held, that the defendant was liable to indemnify the plaintiff against calls made after the defendant had transferred his interest to M.; and that the claim of the plaintiff was not proveable under s. 153 of the Bankruptcy Act, 1861, and the defendant's deed therefore afforded no defence.

Approved in Re C. L. R. 9 Q.B. 241

CASE stated by consent of the parties.

In 1865, a banking company, called Barned's Banking Company, Limited, was formed, registered, and incorporated under the Companies Act, 1862, with a capital of two millions, divided into 40,000 shares of 50*l.* each, and with the liability of the members of the company limited to the amount of the shares respectively held by them.

The plaintiff became and was the original holder, and a registered member of the company, in respect of fifty shares in the company which were allotted to him.

On the 4th of September, 1865, the plaintiff sold to the defendant twenty of the shares, upon each of which the sum of 10*l.* had been paid, at the price of 12*l.* per share; and on the 8th of September, 1865, the defendant paid the purchase-money to the plaintiff, and the plaintiff executed and delivered to the defendant a transfer to the defendant of the twenty shares; and the defendant having also executed the transfer, procured the same to be registered by the company on the 4th of December, 1865, and his name to be entered on the register of members of the company as a registered member of the company in respect of the twenty shares.

The transfer was in the form prescribed by the regulations of the company, and was as follows:—"I, C. W. Kellock, of, &c., in consideration of the sum of 240*l.* paid to me by J. H. Enthoven, of, &c., do hereby bargain, sell, and assign and transfer to the said J. H. Enthoven twenty shares numbered 8808 to 8827 of and in the undertaking called Barned's Banking Company, Limited, to hold unto J. H. Enthoven, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, J. H. Enthoven, do hereby agree to accept and take the shares subject to the conditions aforesaid."

On the 20th of March, 1866, the defendant executed a transfer of the twenty shares, together with 1335 other shares in the company, to one Lewin Barnard Mozley, who having also executed the transfer on the same day, procured the same to be registered by the company and his name to be entered in the register of members of the company as a registered member in respect of the twenty shares. The defendant was, in fact, the trustee and nominee of Mozley, but he concealed this fact from the plaintiff, who was never informed or became aware of it. This transfer was also in the form prescribed by the regulations of the company.

On the 18th of April, 1866, the company stopped payment; and before the plaintiff had ceased to be a member of the company in

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respect of any of the fifty shares allotted to him for a period of one year, the company was, on the 8th of May, 1866, ordered by the Court of Chancery to be wound up compulsorily by the Court under the provisions of the Companies Act, 1862.

At the time when the company was ordered to be wound up 10*l.* per share had been paid or called up upon the twenty shares.

On the 24th of July, 1866, L. B. Mozley was placed on the list of contributories of the company settled by the Court, being the list of existing members belonging to class A, as an existing member of the company, in respect of the twenty shares and other shares of the company.

On the 30th of October, 1866, L. B. Mozley and his then co-partners executed an inspectorship deed under s. 192 of the Bankruptcy Act, 1861, and the same having been assented to by the requisite majority of creditors (including the official liquidators of the company), was duly registered on the 26th of November, 1866, and was and is binding on all the joint and separate creditors of L. B. Mozley and his co-partners; the plaintiff not admitting that he or the defendant were or are such creditors.

On the 9th of February, 1867, the Court made a call of 40*l.* per share upon the contributories in class A, and made an order upon L. B. Mozley to pay the call in respect of the twenty shares and the other shares in the company held by him.

The official liquidators of the company proved under the deed against the estate of L. B. Mozley, but no part of it has been paid by L. B. Mozley out of his estate.

The existing members of the company settled on the list of contributories in class A were unable to satisfy the contributions which were required to be made by them; and the amount of the sums paid or recovered in respect of the call was insufficient to pay the debts of the company, and this having been made manifest to the Court, by an order dated the 6th of December, 1867, the Court settled on the list of contributories of the company the past members of the company, that is to say, those persons who had not ceased to be members for a period of one year and upwards prior to the date of the winding-up of the company, including the defendant, who was placed on the list of contributories as a past member of the company in respect of the twenty shares

and other shares of the company which had been held by him; and also including the plaintiff, who was placed thereon as a past member of the company in respect of the twenty shares and the other shares which had been allotted to him. The list of past members was distinguished as class B.

On the 27th of December, 1866, the defendant and his partners in business executed a deed of inspectorship under and in accordance with the provisions of s. 192 of the Bankruptcy Act, 1861, which having been assented to by the requisite majority of creditors (including the official liquidators of the company), was duly registered on the 29th of December, 1867, and was and is binding on all the joint and separate creditors of the defendant and his partners, the plaintiff not admitting that he or L. B. Mozley were or are such creditors.

On the 20th of March, 1869, all preliminaries having been complied with, the Court ordered the defendant to pay a call of 40*l.* per share in respect of the twenty shares, and the official liquidators proved for the amount of the call against the estate of the defendant, but the same has not, nor has any part thereof, been paid by the defendant nor realised out of his estate.

Negotiations took place between the plaintiff and the official liquidators of the company in reference to the liability of the plaintiff as a contributory in class B, and before any order for a call had been made on the plaintiff an agreement of compromise in reference to such liability was ultimately come to between them. This agreement was sanctioned by the Court of Chancery, but was entered into without the previous knowledge or consent of the defendant.

On the 10th of May, 1871, the plaintiff paid to the official liquidators of the company, in pursuance of the agreement, the sum of 15*l.* per share, in respect of twenty shares sold and transferred by the plaintiff to the defendant.

The plaintiff claims to recover the sum of 300*l.* so paid by him in respect of the twenty shares, together with interest at 5 per cent., from the 10th of May, 1871.

There are debts and liabilities which were contracted by the company before either the defendant or the plaintiff ceased to be a member of the company, in respect of the twenty shares, still

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outstanding and unsatisfied, the total assets of the company, including the whole amount recovered in respect of calls from the contributories in class A and class B, having been sufficient to pay only 5*s.* in the pound to the creditors of the company. The plaintiff had not, until after the making of the agreement of compromise, notice that the defendant had executed a deed of inspectorship, or that he had transferred the shares to L. B. Mozley.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover against the defendant in this action.

Butt, Q.C. (*Cohen* with him), for the plaintiff. Apart from any question arising under the deed of inspectorship, is there a contract between the transferor and transferee of shares that the latter shall indemnify the former against future calls? By s. 38 of the Companies Act, 1862 (25 & 26 Vict. c. 89) (1), a liability is cast upon the plaintiff to contribute to the assets of the company in default of the defendant's doing so. This liability the plaintiff has discharged, and therefore is entitled to be indemnified by the defendant. The principle applicable to the case is stated by Willes, J., in *Moule* v. *Garrett* (2), "Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant; the former is entitled to be indemnified by the latter in respect to the performance of the obligation." Apply that principle to the present case; both these parties are liable to be called upon to pay the debts of the company if wound up within a year. They made the contract for the purchase and sale of the shares with reference to the liability imposed by statute, and as the

(1) 25 & 26 Vict. c. 89, s. 38. "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say):—

"1. No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up. . . . ."

(2) Law Rep. 7 Ex. at p. 104.

one took the benefit of the shares he would be liable to indemnify the other against the obligation. *Roberts* v. *Crowe* (1) is moreover precisely in point. It is true that in that case there was no subsequent transferee, but that is unimportant. Then, does the fact of the defendant having entered into a deed of inspectorship release him from liability? The dates of the transaction are: on the 8th of May, 1866, the company is ordered to be wound up; on the 6th of December, 1866, the plaintiff and the defendant are both placed on the B list of contributories; on the 29th of December, 1867, the deed entered into by the defendant is registered. The call is made on the B list of contributories on the 26th of March, 1869, and the compromise by the plaintiff made with the official liquidator on the 10th of May, 1870. Was the plaintiff, then, such a creditor as to be concluded by the deed? That depends on whether the debt was proveable under s. 153 of the Bankruptcy Act, 1861 (2); but it has been decided in *Re Moor* (3) that that section only applies where there has been a breach of contract before adjudication. Here it is clear from the dates that there was no complete cause of action before adjudication, and the deed is no answer: *Holmes* v. *Symons* (4); *Ex parte Wiseman.* (5)

C. Russell, Q.C. (*Herschell, Q.C.*, with him), for the defendant. The case is distinguishable from *Roberts* v. *Crowe.* (1) The transferor here claims to be indemnified against calls made after the transferee had parted with his interest. In *Walker* v. *Bartlett* (6), the Court of Exchequer Chamber stated that there was a very important distinction between a claim to be indemnified whilst the

(1) Law Rep. 7 C. P. 629.

(2) 24 & 25 Vict. c. 134, s. 153. "If any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose: and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy: provided that in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a court of law."

(3) 1 De G. J. & S. 330; 33 L. J. (Bkcy.) 14.

(4) Law Rep. 13 Eq. 66.

(5) Law Rep. 7 Ch. 35.

(6) 18 C. B. 845; 25 L. J. (C. P.) 263. 2 Jur NS. 643.

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transferee is holder of the shares, and a similar claim after he has parted with them. The cases cited on this point are therefore not applicable. On the other point the question is, whether the plaintiff was in a position to prove under the inspectorship deed. The effect of ss. 74, 75, and 77 of the Companies Act, 1862, is to discharge a bankrupt shareholder from liability to future calls as well as calls already made: for it is provided in express terms that his assignees shall be deemed to be contributories, and shall pay any moneys due from him as a contribution to discharge the debts of the company. *Pickering's Case* (1) seems to shew that the plaintiff might have proved as a debt the right to be indemnified.

[BLACKBURN, J. Section 77 speaks of a "liability to contribute to the assets of the company being wound up." This seems to shew that the section was intended to protect a bankrupt shareholder only against liability to contribute to the payment of the debts of the company, and not against a claim to indemnify a transferor.]

Butt, Q.C., was not heard in reply.

BLACKBURN, J. Even if *Roberts* v. *Crowe* (2) did not decide the matter, I think it is clear upon the authority of *Walker* v. *Bartlett* (3), and also upon general principles, that when there was the contract to purchase the shares from the vendor, there was also an implied contract that the vendee would hold the vendor harmless from all the burdens of the property which he had taken from the vendor. The transferee, who is the purchaser of the property, was to get all the benefits as long as the possession of the property was beneficial; and I think the law implies from that, that the purchaser contracts to indemnify the transferor against all the burdens of the property which he, the transferee, has taken. That being so, I do not think that that liability is got rid of by the purchaser passing over the property to another, who would enter into a similar contract of indemnity as between him and his immediate vendor. I do not see how that relieves the defendant from the contract to indemnify the plaintiff. Now here it turns out, on the facts, that

(1) Law Rep. 4 Ch. 58. (2) Law Rep. 7 C. P. 629.

(3) 18 C. B. 845; 25 L. J. (C.P.) 273, 2 Jur. N.S. 643.

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the defendant, having transferred to another person, cannot be put on the A list. But as a year had not elapsed since the transfer, both the plaintiff and the defendant were put in respect of the same twenty shares upon the B list. The effect of that is, that they are both liable to the calls. I think by the terms of s. 38 they are both debtors for the calls, debtors in præsenti, though the time for payment has not actually arisen. In that state of things, if the defendant had paid the amount unpaid on the shares, which is the amount for which the call has been made, the plaintiff could not be called on to pay. But the defendant did not pay, and consequently the plaintiff was liable to pay the 40*l.* a share. Then the plaintiff made a compromise with the company, by which, instead of their exacting the 40*l.* a share from him, they were content to exact only 15*l.* a share; that diminishes the damages, and therefore the defendant is liable to the plaintiff only for the sum of 300*l.* which he has paid.

The plaintiff, then, can recover that amount, unless the deed, made by the defendant with his creditors, and which binds the creditors at the time of making, prevents it. The defendant has to shew that the plaintiff is one of those creditors. In order to do that, the first step is to shew that under the bankrupt law in force at the time the plaintiff was a person who could prove on the defendant's estate. The legislature has in the different Bankruptcy Acts been enlarging the sphere of proof, and consequently they have enlarged the description of persons who are classed as creditors. But with regard to the Bankruptcy Act of 1861 the only section which there is any pretence for saying has the effect contended for is s. 153; and upon the decisions that were cited, and upon the words too, it is quite plain that that section does not apply in the present case. Section 153 enacts: "If any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained," then the person who has such a demand may prove for it. *Re Moor* (1) decides that the breach of contract which gives rise to the unliquidated demand must accrue before the time of the adjudication. That construction of s. 153 is fortified by the

(1) 1 De G. J. & S. 330; 33 L. J. (Bkcy.) 14.

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language of s. 154, which makes a person a creditor in respect of fixed sums of money payable yearly or otherwise. That shews that the legislature was aware that to meet the case of a contract not yet broken it was necessary to provide for its proof in express words, yet it confines the enactment to cases of fixed sums. It seems, therefore, that this particular class of liability has not been made proveable under the Bankruptcy Act of 1861, and consequently this deed is no defence.

Mr. Russell attempted to argue, that, because the company proved against the defendant under this deed, though the company may only have got a shilling in the pound, we are to consider the debt as paid, and that therefore the plaintiff is to be treated as having paid the debt by the defendant. But that is not so. The amount was unpaid; it was unpaid in the sense that any creditor or debtor would understand it; it is unpaid by actual payment; and it cannot be considered as paid if the person liable for it becomes bankrupt and has got a discharge. If there were not the decision of *Roberts* v. *Crowe* (1) to that effect, I should have no hesitation in so holding. Consequently the defendant fails on all the points, and the plaintiff is entitled to judgment for the sum of 300*l*.

QUAIN, J. I am of the same opinion. It is clearly established by *Roberts* v. *Crowe* (1) that there is a contract to indemnify the transferor in respect of a subsequent liability; and that applies when the transferee is put on the A list and the transferor on the B list; and the cases shew that there is no distinction when both the transferor and transferee are put on the B list, as in the present case. Mr. Russell sought to point out a distinction in this case from the fact that the defendant had transferred his shares to another. He says that the contract of indemnity is not to hold the transferor harmless against any liabilities which he may incur as having been the holder of the shares within a year before the winding-up, but that the liability is to be limited to the time during which the transferee is the actual possessor of the shares, and ceases when he transfers them. There is nothing in the cases, or in the language of s. 38, or the nature of things, which goes so to limit the liability: because the liability arises from the enact-

(1) Law Rep. 7 C. P. 629.

ment that the transferor shall remain liable for twelve months after he has transferred the shares. That point did not arise in *Burnett* v. *Lynch* (1), nor in *Walker* v. *Bartlett* (2); there the liability ceased at once when the transfer took place; but here the statute expressly says that it shall not cease until twelve months afterwards. It is out of that that the liability arises; therefore, there cannot be any such limitation of liability on the part of the defendant as Mr. Russell contends for.

The other point is, whether the liability on the part of the defendant to the plaintiff was in existence at the time of the registration of the deed. It seems, on the authorities, that the debt did not arise until long after, and it was only then that the damages could arise in respect of this matter. It is clear that the plaintiff is not brought under s. 153, because, as Lord Westbury says, in *Re Moor* (3), there is no cause of action complete at the time; it did not arise until two years afterwards. Therefore there was no proveable debt here; and consequently it is not discharged. For these reasons I agree with my Brother Blackburn that the judgment ought to be for the plaintiff.

ARCHIBALD, J. The two questions in this case appear to be, what is the nature and extent of the liability incurred by way of indemnity upon the transfer of shares; and to what extent, if at all, is the deed of inspectorship a defence? With regard to the first point, I think it is clear that the contract of indemnity must extend to relieve the transferor, as between him and the transferee, entirely from future burthens of the property. The very reason of the thing seems to be in accordance with that view, because the transferor parting with the whole benefit of the shares and transferring that to the transferee, as between him and the transferee the only implication must be that the transferee is to hold the transferor harmless as regards all future calls. The legislature has left him liable to the company primarily for a year after the transfer, but that does not affect the question as between transferor and transferee. Therefore, both upon reason and on the decisions, the point is perfectly clear, that though the

(1) 5 B. & C. 589. (2) 18 C. B. 845; 25 L. J. (C.P.) 263.

(3) 1 De G. J. & S. 330; 33 L. J. (Bkcy.) 14.

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transferee has transferred to somebody else, he cannot by that means get rid of his liability to his transferor.

As regards the second point, as to the effect of the inspectorship deed, the question is, whether there was a liability which could be proved under the deed by the plaintiff. I think, when we look at the language of s. 153, which says, "If any bankrupt shall at the time of adjudication be liable to a demand . . . in the nature of damages," it is clear it means a legal liability accrued at the time. That is the effect of the decision by Lord Westbury; and I confess, upon the language of the statute, I should think one can have very little doubt that that is the meaning of it; it means that a right of action must have accrued at the time, and unless it has taken place there is no right to prove under the deed. Here the plaintiff had no right to prove under the deed; and, though the remedies on behalf of the company are much larger, so that under s. 75 of the Companies Act, 1862, they may prove against persons on the A list, even before calls are made, so that there is a liability to pay in the future, yet that makes no difference at all as regards a case of this kind. The liability of the defendant to the plaintiff not being complete at the time the defendant executed the deed, the plaintiff would have no right to prove at all. I think, on both these grounds, the defendant has failed, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Rawle.*
Attorneys for defendant: *Elmslie, Forsyth, & Sedgwick.*

FISHER AND OTHERS *v.* THE LIVERPOOL MARINE INSURANCE COMPANY.

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July 5.

Marine Insurance—"*Slip*"—*Policy*—30 *Vict. c.* 23, *ss.* 7, 9.

The defendants, a Liverpool insurance company, employed the firm of E. & Co. as their agents in London to accept risks and receive premiums in London. The plaintiff instructed P. & Co. to insure for him steel rails, and P. & Co. prepared a slip which was initialed by E. & Co. on behalf of the defendants. According to the course of business observed by the defendants' company, P. & Co. sent a copy slip to E. & Co., who the same night sent it to the defendants at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the defendants then refused to execute any stamped policy:—

Held (by Quain and Archibald, JJ.; Blackburn, J., dissenting), that no action would lie: for that the initialing of the slip and forwarding the copy slip to the defendants were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the defendants; and as no stamped policy had been executed, 30 Vict. c. 23, ss. 7 and 9, prevented the plaintiff from maintaining an action.

FIRST COUNT on a warranty by the defendants that one Eames was duly authorized as their agent to accept risks on their behalf, and that he was not so duly authorized.

Second count on a fraudulent representation by the defendants that one Eames was their agent to accept certain risks on their behalf, whereas in truth and in fact he was not their agent.

Plea: Not guilty. Issue joined.

At the trial before Brett, J., at the Liverpool Summer Assizes, plaintiffs' counsel admitted that they could not recover on the present pleadings, but leave was given to amend in any way that would support their case. A verdict was found for the plaintiffs for 1000*l.*, leave being reserved to enter a nonsuit or a verdict for the defendants. A rule was afterwards obtained accordingly.

June 5. *Benjamin, Q.C.*, and *Macafee*, shewed cause, and cited *Langridge* v. *Levy* (1) and *Dutton* v. *Powles*. (2)

R. G. Williams, in support of the rule.

The facts of the case and the arguments sufficiently appear in the judgment of the Court.

Cur. adv. vult.

(1) 2 M. & W. 519. (2) 2 B. & S. 174; 31 L. J. (Q. B.) 191.

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July 5. The following judgments were delivered:

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BLACKBURN, J. In this case, on the trial before my Brother Brett at Liverpool, the plaintiffs had a verdict for 1000*l.*, subject to leave to move to enter a verdict for the defendants, reserved by the learned judge in the following terms: "if there was no evidence upon an amended declaration, or if I ought not to have amended." The Common Law Procedure Act, 1852, s. 222, gives the judge at nisi prius power to make all amendments on such terms as he thinks fit, and requires that all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be made. No suggestion was made, either at the trial or on the argument, that there were any terms which it was proper to impose. That being so we must construe this reservation as meaning that if there is any form of declaration under which the evidence at the trial would prove the plaintiffs' right to recover, the verdict is to stand.

Mr. Aspinall obtained a rule on four grounds, thus stated in the rule: First, that there was no evidence to go to the jury; second, that no action will lie on the slip alone without a policy; third, that no interest was shewn in the plaintiffs; fourth, that the learned judge should not have allowed the declaration to be amended. Against this cause was shewn, in the first instance, before my brother Quain and myself, when we were agreed that there was no foundation for the objection that no interest was shewn in the plaintiffs, and that was disposed of on the argument, and we need not further notice it. On the other points we felt so much difficulty that we directed a second argument, when my brother Archibald could be present, and after that argument the Court took time to consider.

To make the case intelligible it is necessary to state the material part of the evidence. From the judge's notes it appears that the defendants, a Liverpool Insurance Company (Limited), employed the firm of Eames & Co. as their agents in London to accept risks and receive premiums in London. One of that firm was called as a witness, and gave evidence that the course of business was that he accepted risks for the defendants by himself initialing the slip. That when he had initialed the slip a copy of the slip (as he called it) was sent to him.

This appears to have been the practice described in the 7th paragraph of the case stated in *Xenos* v. *Wickham*. (1) In that case I expressed an opinion, to which I still adhere, that what is here called the copy of the slip is not, like the first slip, in legal effect a memorandum of the terms on which the parties agree to insure, but a request unto or mandate to the company to make out and execute a policy according to the practice. (2)

The witness proceeded to explain that the course of business was that the witness always forwarded the copies of the slips or request notes to the defendants at Liverpool on the same night that they were received by him in London. A circular, approved by the defendants, informing the public that Eames & Co. were their London agents, was put in.

The plaintiffs had instructed John Patten, junior, & Co., insurance brokers in London, to insure for them steel rails, and on the 16th of November, 1871, Patten & Co. prepared a slip, which was put in evidence at the trial, and which has been produced before us. It was headed in print "Cash, John Patten, junior, & Co.," and was dated "16th of November, 1861." Then, in writing, followed:

"*Lizzy.*

"Barrow. New York.

"Steel Rails. f. p. a.

"f. g. a. . . . 880*l.*
"f. c. & s. . . . 6000*l.* } 60/ %"

Below followed several sums initialed by different parties. These sums in all amounted to 4200*l.* Amongst them was "1000*l.* T. R. E." It was proved by the evidence of Mr. Eames that these were his initials. No evidence was given as to the effect of this; but there is no doubt that in mercantile understanding this amounted to an agreement between the brokers Patten & Co., and Eames (acting for the defendants) to insure on the ship *Lizzy*, on a voyage from Barrow to New York, 1000*l.*, part of 6880*l.*, on steel rails, free of particular average and of general average, and of capture and seizure, at 60*s.* per cent., and that the premiums were to go into the cash account.

(1) 14 C. B. (N.S.) at p. 438.
(2) 14 C. B. (N.S.) at p. 454; 33 L. J. (C. P.) at p. 16.

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I will consider the effect of the revenue laws on this afterwards.

The copy slip or request note was made out by Patten & Co. and sent to Eames & Co., who on the same night sent it on to the defendants at Liverpool. It was not stated by any witness when this was done. In regular course it ought to have been done directly after the slip was initialed, and the stamped policy ought then to have been sent up by the defendants to Eames & Co. duly executed by them soon after. Had this been done in November, the amount of the premium, in this case 30*l.* less 10% on that amount for discount, or in this case 27*l.*, less a still further deduction of 5% on that 27*l.*, making the net sum 25*l.* 13*s.*, would have been payable on the 8th of December by the broker to the defendants; and, as the defendants would have advanced for the broker the amount of the stamp, that would have been due at once, though for convenience sake the actual payment would in practice, no doubt, be made at the same time when the larger sum for the premiums was paid.

The defendants, for some reasons not explained but probably connected with their being in liquidation, neglected to send up the stamped policy. Patten & Co.'s clerk proved that he several times called for it at Eames & Co.'s and was told that it had not come up, and that Eames & Co. would write to the defendants sharply about it. At last, on the 29th of January, 1872, the defendants' liquidators wrote a letter to Eames & Co. inquiring whether this slip was to go forward. Eames immediately communicated with Patten & Co., and in consequence of their directions the slip was put forward, and Eames & Co. forwarded to Patten & Co. an account, of which the following is a copy:

"The Liverpool Marine Insurance Company, Limited, London Agency, Eames & Co., St. Michael's House, Cornhill, E.C.

"To premiums for the month of January, 1872,

less brokerage and 10 per cent. discount for cash	£25	13	0
"Policy duty	0	2	6
	25	15	6

"Note.—The discount will be forfeited in default of prompt payment on the 8th of February."

This account, it will be observed, is made out exactly as if there had been a fresh slip initialed in January and the stamp had been duly procured by the defendants. For some reason not explained, actual payment was not made by Patten & Co. till the 13th of March, on which day they paid the amount to Eames & Co. by a cheque payable to defendants' order. Eames & Co., by virtue of an authority which they had from the defendants, indorsed that cheque and received the money. These facts are very strong evidence that, as between Eames and Patten, it was understood that the company had undertaken the duty of preparing the policy. The defendants never did prepare or execute any stamped policy. The *Lizzy* was totally lost, and then the defendants refused to execute any policy or to pay the insurance.

The main contention of the defendants was, that the plaintiffs could not recover unless the Court, in direct contravention of 30 Vict. c. 23, ss. 7 and 9 permitted the plaintiffs to make available a contract for marine insurance not expressed in a stamped policy; and on the pleadings as they stood at the trial this was the case. But the learned judge was of opinion, and we think quite correctly, that, if by any amendment the pleadings could be made such as to enable the plaintiffs to recover for the breach of the defendants' duty without contravening the statute, that amendment should be made.

He asked the jury three questions:

1st. Did the defendants authorize Eames to issue slips, and accept risks, and receive premiums?

2nd. Did the defendants, by approving the circular, and the authority which they gave to Eames to issue slips and accept risks and premiums, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if the plaintiffs paid the premium and stamp on a slip initialed by Eames, they, the defendants, would issue a policy in accordance with the slip?

3rd. Were the plaintiffs prevented by the conduct of the defendants from insuring elsewhere?

The jury found for the plaintiffs, and the verdict was entered for 1000*l.*, subject to the leave already mentioned.

I have come to the conclusion that the plaintiffs may in this case recover without infringing the existing revenue laws. In *Marsden* v.

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Reid (1) the Court of King's Bench decided that the then Stamp Acts forbade them to look at the slip for any purpose. In that case the defence was that a material representation was made to the first underwriter to induce him to subscribe, which representation, the defendants contended, was to be taken to have been made to all the rest of the underwriters, who acted on the credit of that first underwriter, without the necessity of repeating it to each. It is obvious that the underwriter who was the first in this sense, was the first underwriter who agreed to subscribe and first initialed the slip, not the one who first signed the policy; but the Court thought themselves bound to hold the contrary.

A subsequent statute, 54 Geo. 3, c. 144, provided for the stamping of slips; but I believe that slips never were in practice stamped, though that Act remained on the statute book till 30 Vict. c. 23. The whole of the Stamp Acts were, as far as related to marine insurance, repealed by 30 Vict. c. 23, and therefore we need not inquire whether the monstrous injustice done in *Marsden* v. *Reid* (1) was really forced upon the King's Bench by the then Stamp Acts. It has been determined on the construction of the now existing Act, that, though the slip, being a contract for insurance not expressed in a stamped policy, is void as a contract, and as such not admissible in evidence, it is admissible for other purposes: see *Ionides* v. *Pacific Insurance Co.* (2); *Cory* v. *Patton* (3); *Lishman* v. *Northern Maritime Insurance Co.* (4).

In the case now before us Patten & Co., as brokers to the plaintiffs, had undertaken a duty to use due care and diligence about procuring, making, and completing the insurance for them.

When a slip is initialed the contract is binding in honour, but not in law; and the broker's duty requires him to take the further steps to procure it to be made binding in law. For this purpose it is necessary that the policy should be drawn up on stamped paper, and the brokers have to advance the stamp and see that the policy is properly drawn up, and then to take care that within a reasonable time the matter is concluded.

The broker does not undertake that the underwriter who has initialed the slip shall sign the policy, though that is the way in

(1) 3 East, 572.
(2) Law Rep. 7 Q. B. 517, in Ex. Ch.
(3) Law Rep. 7 Q. B. 304.
(4) Law Rep. 8 C. P. 216.

which, in the great majority of cases, the matter is concluded; and as soon as the underwriter has signed, the premiums are, as between the assured and the underwriters, paid; the underwriter taking in satisfaction of them the broker's personal promise to pay at the end of the customary period, subject to the customary deductions. But if the underwriter refuses to sign, there is no mode, either at law or in equity, to force him to do so. The matter, in that case, is concluded by this breach of honour on the part of the underwriter; and if the broker has used due diligence to bring it to a conclusion, either one way or the other, within a reasonable time, he has done his duty.

If the broker has been negligent, and, in consequence, the final conclusion of the matter has been unreasonably delayed, the broker is responsible to his principal for the damage sustained through that delay. That damage must depend on circumstances; if, notwithstanding the delay, the risk will be still taken by other underwriters at the same premiums, the damage would generally be nothing; if the risk was still insurable, but at an enhanced premium, the measure of damages would generally be the increase of the premium; but if, in consequence of the delay, news of the loss had come, or for any other reason, the risk was no longer insurable, the damage would generally be the amount which would have been recoverable if a stamped policy had been duly executed within a reasonable time.

In order to prove the case against the broker, it would be necessary to give in evidence the slip, not for the purpose of enforcing it as a contract of insurance, but for the collateral purpose of shewing that the broker had not used due diligence in bringing the matter to a conclusion within a reasonable time, so that the principal might be insured elsewhere if this underwriter did not insure him; and I think, on the authority of the cases above cited, the slip is admissible for such a purpose.

Then it seems to me that on the usage stated in *Xenos* v. *Wickham* (1), and followed in this case, the effect of giving to a company a request slip, or copy slip, and of the company accepting it, is that the company,—by what I consider a fresh arrangement, no part of the contract made by initialing the slip,—take on them-

(1) 14 C. B. (N.S.) at p. 438.

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selves that which would otherwise be the duty of the broker, viz. to use due skill and diligence about preparing the policy properly and bringing the transaction as regards the company's subscription to a conclusion in a reasonable time. And for this undertaking the mere fact that they were trusted with that duty would be a sufficient consideration.

I do not think that the company by this acceptance of the request slip promises to execute the policy; that it had already done by initialing the slip, and the acceptance of the request slip carries that contract no further. But I think that it does,—by what, when the practice first begun, must have been in each case an express subsequent agreement, and what I think still is a subsequent agreement, though now a usual one,—take upon itself a responsibility precisely co-extensive with that which the broker would otherwise have undertaken. If the company at once returns the request slip, and without any delay informs the assured that it will not execute a policy though bound in honour so to do, I do not think that any action would lie against it. The assured would then be at liberty to insure elsewhere. But if the company is guilty of unreasonable delay the damages to which it would be liable would, I think, be just the same as the broker would have been liable to if he had been guilty of the same delay. And I see nothing inconsistent with the objects of the revenue laws in enforcing a contract to pay the government for the stamp. Nor do I see any reason why we should strain to turn the second independent contract into a part of the first, in order to bring the same within the letter of the statute if it is not within its spirit.

In the present case I think that the evidence and the answer of the jury to the first question put by my Brother Brett would prove a count framed on the undertaking of the defendants to use due skill and diligence in framing a stamped policy in conformity with the request slip, and bringing the transaction to a conclusion within a reasonable time, either by executing or repudiating that policy. And I think that the evidence and the answers of the jury to the second and third questions shew a breach of that duty, and damage sustained by the plaintiffs, justifying the verdict for 1000*l*. And I think that, by giving effect to that verdict, we should not transgress 30 Vict. c. 23, as we should neither treat the contract

for assurance contained on the slip as valid, nor make it available at law as a policy, but merely receive it in evidence for the collateral purpose of shewing the duty which the defendants took upon themselves and neglected.

I think, therefore, that the rule should be discharged; but, as the majority of the Court are of a different opinion, it must be made absolute.

ARCHIBALD, J. I am about to deliver the judgment of my Brother Quain and myself.

The question in this case is whether upon the facts, and assuming the necessary amendment made, the plaintiffs are under any form of declaration entitled to recover, notwithstanding the provisions of 30 Vict. c. 23.

The facts as proved are fully set forth in the judgment of my Brother Blackburn, and it is unnecessary therefore to repeat them in detail.

Those which are the most material relate to the difference, in regard to the preparation of the stamped policy, between the usage in the case of private underwriters and that which prevails in the case of insurance companies. In the former case, after the slip has been initialed, the usage is for the broker of the assured to advance the stamp, draw up the policy on stamped paper, and present it to the different underwriters for execution. But in the case of an insurance company, after the slip has been initialed by an agent of the company it is retained by the broker of the assured, and a copy of it is then sent to the company by the broker, in order to enable the company to prepare the policy. The policy is then drawn upon stamped paper by the company, who themselves advance the stamp and execute the policy, ready to be delivered to the assured or his broker. The duty of the broker of the assured in ordinary cases, and the measure of damages for any breach of it, are well established and understood; and if the evidence in this case satisfied us that a precisely analogous duty, unconnected with and separate from a promise to execute the policy, was undertaken by the defendants' company, we should have no doubt that the consequences of a breach of duty by the company would be similar to those of a breach by the broker. It appears to us also, that inas-

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much as the slip, though invalid as a contract, would be admissible in evidence for the collateral purpose (see *Ionides* v. *Pacific Insurance Co.* (1); *Cory* v. *Patton* (2)) of establishing the existence and the breach of such a duty, the plaintiffs would, if the declaration could be made to assume such a shape, be entitled to recover. Indeed, this seems to us to be the only conceivable form of declaration upon which, if at all, the defendants can be rendered liable; for 30 Vict. c. 23, expressly renders invalid any "contract or agreement for sea insurance, unless it be expressed in a policy" (in which also certain prescribed particulars must be specified), and prohibits its being "pleaded, or given in evidence, or admitted in any Court to be good or available in law or in equity, unless duly stamped," i.e., stamped before being signed or underwritten; so that no action can be directly maintained upon the slip itself, which, in the opinion of all of us, amounts to an agreement for sea insurance within the meaning of the Act: see per Willes, J., in *Xenos* v. *Wickham*. (3)

It is abundantly clear that, in consequence of the provisions of the Act, the engagement entered into by initialing the slip cannot be directly enforced either at law or in equity; and being therefore only binding in honour, it is open to unconscientious men to break it, unless it can be indirectly enforced in the manner and on the grounds suggested by our Brother Blackburn in his judgment. Whether it can or not in the present case depends upon the true nature and effect of the usage with respect to the preparation of the policy.

In the case of private underwriters the engagement entered into by initialing the slip must, having regard to the course of business, be understood to be an engagement to execute a stamped policy when it has been prepared and presented by the broker. In the case of insurance companies it is equally understood to be an engagement to execute a stamped policy at some time, and under some circumstances, and the question is, whether it does not also import that the company are, on receipt of the copy of the slip, to procure the stamp and fill up the policy.

When or how the difference of usage between the case of private

(1) Law Rep. 7 Q. B. 517. (2) Law Rep. 7 Q. B. 304.
(3) Law Rep. 2 H. L. at p. 314.

underwriters and that of companies first sprung up does not appear. The monopoly of the two old companies, the Royal Exchange and the London Assurance was done away with in 1824 by 5 Geo. 4, c. 114 ; and it may be that when other companies were first established for carrying on the business of marine insurance, the practice as it exists between policy brokers and private underwriters was in the first instance adopted, and that the present practice of sending a copy of the initialed slip to the company, in order that they, and not the broker, might procure the stamp and prepare as well as execute the policy, afterwards came into use ; or it may be that from the first the latter course was found to be the most convenient. However this may be, it makes, in our judgment, little difference to the question under consideration : for it appears to us that when this practice became the fixed and settled usage, the only reasonable implication from the initialing of the slip on behalf of a company is that it is an engagement, not merely generally to execute a binding policy, but to execute it in accordance with the usual and accustomed course of business, including therefore an undertaking on receipt of the copy of the slip to procure a stamp and fill up the policy.

If, then, this be, as we think it is, the true effect of the transaction, the agreement being one and entire, and including as part of it an undertaking to execute the policy, i.e., an agreement for sea insurance, the statute applies and presents an insuperable obstacle to any action founded on a supposed breach of duty in not procuring a stamp and preparing a policy, or in failing to give notice within a reasonable time that the company decline to prepare and execute it.

It is contended that in the case of companies there are, in fact, two separate transactions : First, the initialing of the slip constituting an agreement to execute a policy ; and, secondly, an agreement on a new and separate consideration, upon receipt and acceptance of the copy slip, to do all that it is the duty of a broker to do in the case of private underwriters.

We are unable to concur in this view. It appears to us that there is no evidence of any such second agreement, separate and distinct from the agreement which arises from initialing the slip, namely, the agreement to execute the policy. In our opinion

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there is only one agreement, viz., that which is to be implied in accordance with the usual course of business from the initialing of the slip. Nor do we think that there is any duty cast upon the company, separate and distinct from the rest of their agreement, or which bears any true analogy to the well-known duty of a policy-broker. The copy slip, sent by the broker of the assured to the company, is sent merely for the purpose of enabling the company to prepare and fill up the stamped policy; and we do not think that it imposes on them any fresh duty different from that they had already undertaken, or transforms the company into brokers for the assured.

The broker, in his endeavour to procure the completion of the policy, has to deal with third persons over whose intentions or decision in the matter he has of course no control. If, when he has done all that his duty in the matter prescribes, the underwriter should decline to execute the policy, the broker would be discharged, if within a reasonable time he gave notice of it to his employer, in order that the latter might effect or direct an insurance to be effected elsewhere. But the company, if any analogous duty were supposed to be incumbent on them, would certainly not fulfil it by merely preparing a stamped policy ready for execution in their office, if they stopped short of executing it; and if it were added to their supposed duty that they were, within a reasonable time after they decided not to execute, to give notice of such intention, this would imply a duty to make up their minds within a reasonable time whether to keep or break their agreement, a duty altogether unlike anything undertaken by a broker.

We are unable upon the facts to find that there is any such duty undertaken upon a new consideration, or any duty whatever separable from the contract to insure in the usual and customary manner; and upon the whole, therefore, we are of opinion, that there is no possible form of action under the circumstances of this case which could be maintained without contravening 30 Vict. c. 23.

For these reasons we are of opinion that the rule to enter the verdict for the defendants must be made absolute.

Rule absolute.

Attorney for plaintiffs: *J. McDiarmid.*

Attorneys for defendants: *Venn & Son.*

BELL, APPELLANT; CRANE, RESPONDENT. 1873

Sunday and Ragged Schools (Exemption from Rating) Act, 1869 (32 & 33 *Vict.* c. 40) *s.* 1—"*May exempt*" *discretionary.* *May* 28

Under 32 & 33 Vict., c. 40, s. 1,—which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate,—the rating authority have a discretion whether they will or will not exempt such a building.

9 C.B.D. 240

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

Complaint was preferred by the respondent against the appellant, that he had not paid certain rates to which he had been assessed in the parish of St. Pancras.

The appellant was rated as honorary secretary and treasurer to the committee of management of "the Boys' Home and Industrial School for destitute boys not convicted of crime," situate in the Regent's Park Road, in respect of the premises occupied by and for the general purposes of the Boys' Home.

It was contended by the appellant, on the facts (which it is unnecessary to set out), that the Boys' Home was a ragged school within the meaning of 32 & 33 Vict. c. 40 (1), and as such, was exempt from rates.

It was contended by the respondent that the "Home" was not

(1) 32 & 33 Vict. c. 40: An Act to exempt from Rating Sunday and Ragged Schools.

Whereas, for many years, and until lately, buildings used as Sunday and ragged schools for gratuitous education, enjoyed an exemption from poor and other rates, and it is expedient that they should be exempted from such liability. Be it therefore enacted,—s. 1: From and after the 30th day of September, 1869, every authority, having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school, may exempt such building or part of a building from any rate for any purpose whatever which such authority has power to impose or levy: Provided that nothing in this Act contained shall prejudice or affect the right of exemption from rating of Sunday or infant schools, or for the charitable education of the poor in any churches, district churches, chapels, meeting-houses, or other premises, or any vestry rooms belonging thereto, or any part thereof, by virtue of 3 & 4 Wm. 4, c. 30, intituled "An Act to exempt from poor and church rates all churches, chapels, and other places of religious worship."

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within the Act; and that if it was, it was discretionary with the vestry under s. 1 (1), whether they would exempt it from rates; and that if the premises were exempt from rating under the Act, the appellant ought to have claimed exemption by appeal under 32 & 33 Vict. c. 67, and that the magistrate was bound to enforce the rate.

The magistrate was of opinion that the appellant was liable for the rates, and ordered payment of the amount.

The question for the Court was, whether the Boys' Home was exempted from payment of the rates.

Benjamin, Q.C. (*Lumley* with him), for the appellant, was directed by the Court to argue the question of discretion. He contended that "may" must be construed to give a power, and not a mere discretion, as had been decided in several instances. He cited *Rex* v. *Barlow* (2), *Crake* v. *Powell* (3), *Macdougall* v. *Paterson* (4), *Reg.* v. *Tithe Commissioners.* (5) That the intention of the legislature was to exempt ragged schools absolutely, and not to leave it in the discretion of the authorities, was shewn by the preamble of the Act.

Poland, for the respondent, was not called upon.

BLACKBURN, J. There is no doubt that "may," in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power when the facts are such as to call for it. But in the present Act, instead of saying that Sunday and ragged schools shall be exempt, the legislature say the rating authority "may exempt" them; and then they go on to say that this shall not deprive churches or other places used for Sunday schools of the exemption from rating which they enjoy under 3 & 4 Wm. 4, c. 30. This shews that it was not intended that the exemption under the present Act should be absolute. It is clear, therefore, that the use of the phrase "may

(1) See ante, p. 481, n.
(2) 2 Salk. 609.
(3) 2 E. & B. 210; 21 L. J. (Q.B.) 183.
(4) 11 C. B. 755; 21 L. J. (C.P.) 27.
(5) 14 Q. B. 459; 19 L. J. (Q.B.) 177.

exempt" was intended to give a discretion. Whether this was a ragged school or not I express no opinion.

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QUAIN and ARCHIBALD, JJ., concurred.

Judgment for the respondent.

Attorney for appellant: *Leefe,*
Attorney for respondent: *Wm. Durrant Cooper.*

ROBERTS, APPELLANT; HUMPHREYS, RESPONDENT.

May 28.

Intoxicating Liquors, Sale of, during prohibited Hours—"Licensing Act, 1872" (35 *&* 36 *Vict. c.* 94), *ss.* 24, 51, *subs.* 4—*Onus of Proof of Exception or Excuse on Defendant—Bonâ fide Belief.*

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 24, premises in which intoxicating liquors are sold are to be closed during certain hours; and "any person who sells or exposes for sale, or opens or keeps open premises for the sale of intoxicating liquors during the time that such premises are directed to be closed, in pursuance of this section," is made liable to certain penalties; and in a subsequent clause it is enacted, that "none of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to bonâ fide travellers or persons lodging in his house." By s. 51, subs. 4, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant."

The keeper of licensed premises having been charged with opening his premises for the sale of intoxicating liquors during prohibited hours, and persons having been shewn to have been supplied with liquor on his premises during such hours:—

Held, that the onus of shewing that the persons came within the exception lay on the defendant.

Quære, whether proof on the defendant's part of a bonâ fide though mistaken belief that the persons were travellers would have been sufficient.

CASE STATED by Justices of Worcestershire, under 20 & 21 Vict. c. 43.

The appellant appeared to an information under 35 & 36 Vict. c. 94 (the Licensing Act, 1872), charging that he, being a person licensed to sell intoxicating liquors by retail, to be drunk and con-

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sumed on the premises, did, on Sunday, the 1st of September, 1872, at the parish of King's Norton, in the said county, open his house and premises for the sale of intoxicating liquors during the time such premises are directed to be closed, that is to say, at the hour of ten minutes past eleven o'clock in the forenoon of the said day, otherwise than for a bonâ fide traveller or to persons lodging in his house, such premises being situate beyond the city of London and the liberties thereof, and the parishes and places subject to the jurisdiction of the Metropolitan Board of Works, and beyond the four-mile radius of Charing Cross (1).

2. Upon the hearing of the information it was proved by Richard Humphreys, superintendent of police, that at ten minutes past eleven o'clock in the forenoon of the day named he visited the appellant's premises, known as the Sherborne Hotel and St. Helena Gardens, situate in the Sherborne Road, Balsall Heath, in the county of Worcester, about 200 yards outside the boundary of the borough of Birmingham, in the county of Warwick, in a direct line, and within a distance of 400 yards by road; that he found there nineteen persons, having the appearance of and being, in his judgment and opinion, Birmingham artisans; and some were in their working clothes. They were orderly and sober, dispersed about the house and gardens, some were seated; they were drinking for the most part ale, and some were smoking. The manager of

(1) By the Licensing Act, 1872 (35 & 36 Vict. c. 94) s. 24, "Subject as hereinafter mentioned, all premises on which intoxicating liquors are sold or exposed for sale by retail shall be closed as follows: . . ."

[Then follow certain hours on Sundays and week days, in the city of London and without the limits respectively; and the section then proceeds:—]

"Any person who sells or exposes for sale, or opens or keeps open premises for the sale of intoxicating liquors during the time that such premises are directed to be closed by or in pursuance of this section, or during such time as aforesaid allows any intoxicating liquors to be consumed on such premises, shall for the first offence be liable to a penalty not exceeding 10*l.*, and for any subsequent offence to a penalty not exceeding 20*l.*

"Any conviction for an offence against this section shall be recorded on the licence of the person convicted, unless the convicting magistrate or justices otherwise direct.

None of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to bonâ fide travellers or to persons lodging in his house. . . ."

Sect. 51, subs. 4, is set out in par. 5 of the case.

the appellant's establishment informed him that none but bonâ fide travellers were admitted, and that every precaution was taken to prevent the admission of persons who were not bonâ fide travellers. Humphreys asked the men their names and addresses; they without hesitation and with one exception (a man who had come from Oldbury, seven miles distant) stated in the presence of the manager that they came from central parts of the town of Birmingham, at distances varying from a mile and three quarters to two miles and a half, which Humphreys subsequently upon inquiry found to be correct. It did not appear whether they had travelled or were about to travel any further, nor did any of them make assertion to that effect.

3. Counsel for the appellant called William Benbow, a superannuated sergeant of the Birmingham police, who deposed that he was employed by the appellant and was placed at the entrance to the premises expressly for the purpose of preventing, as far as possible, admission to the appellant's premises during prohibited hours of any other than bonâ fide travellers; and acting on the appellant's orders, he questioned all persons applying for admission as to whence and the distance they had come; that four of them told him that they had come from Leicester on the night previous and had come that morning from Aston, three miles off; others from Walsall, one from Oldbury, and some from the farther side of the town of Birmingham, and no one was admitted who did not state that he had come more than three miles; and any one who had given such answers as were given to Humphreys would have been refused admittance; and that admittance was refused to all those whose answers to his inquiries were unsatisfactory.

It appeared that two notices in large type were posted, one at the entrance and the other in a conspicuous place within the premises, to the effect that none but travellers were admitted. The appellant's manager gave similar evidence, and deposed that he in his turn questioned the persons applying for refreshment, and did not supply them unless their answers were satisfactory.

4. Upon this evidence the appellant's counsel contended, on the authority of *Taylor* v. *Humphries* (1), *Peache* v. *Colman* (2), *Pepiow*

(1) 17 C. B. (N.S) 539; 34 L. J. (M.C.) 1. (2) Law Rep. 1 C. P. 324.

10 Jur. N.S. 1153. 12 Jur. N.S. 273.

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v. *Richardson* (1), *Davis* v. *Scrace* (2), *Morgan* v. *Hedger* (3), and *Copley* v. *Burton* (4), that the onus of proof that the persons were not bonâ fide travellers rested upon the complainant; that the distances which the persons had come constituted them bonâ fide travellers; that the appellant had used due diligence and exercised every reasonable precaution to prevent an infraction of the law, and that was all that could be required of him; and that it was impossible further to test the truth or falsehood of the representations which the men had made.

5. The justices were of opinion: first, that the persons found on the premises were not all bonâ fide travellers; secondly, that inasmuch as upon certain misrepresentations made by persons who were not bonâ fide travellers intoxicating liquors had been obtained by them, sufficient diligence had not been used. That the cases cited were not applicable to the present case, as although it had been ruled before the Licensing Act, 1872, that the onus of proving that the persons found on the premises were not within the exception rested on the complainant, that Act had by the 4th paragraph of s. 51 materially altered the law in that respect. It enacts, that "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information; but if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant; and in all cases of summary proceedings under this Act the defendant and his wife shall be competent to give evidence."

6. In the present case the exception was in favour of bonâ fide travellers; it was specified in the information; it was not required to be negatived on the part of the informer. The defendant was at liberty to prove it if he could, but in the opinion of the justices he had failed to do so.

They therefore convicted him in the penalty of 5*l.* and costs.

April 30 and May 28. *Poland*, for the appellant. The justices were

(1) Law Rep. 4 C. P. 168.
(2) Law Rep. 4 C. P. 172.
(3) Law Rep. 5 C. P. 485.
(4) Law Rep. 5 C. P. 489.

wrong, and acted contrary to the decision in *Taylor* v. *Humphries* (1), as explained by *Davis* v. *Scrace* (2), under 11 & 12 Vict. c. 49, s. 1, and 11 & 12 Vict. c. 43, s. 14.

[BLACKBURN, J. In those cases the clause in the statute (11 & 12 Vict. c. 49, s. 1) creating the offence excepted travellers in the description of the offence; moreover, the language of s. 51, subs. 4, is much wider than the language in s. 14 of 11 & 12 Vict. c. 43, and was intended to have a much wider effect than had been given by the decisions in the Common Pleas to s. 14.]

It could never have been the intention of the legislature that a man, who innocently admits a person believing him to be a traveller, or who has been tricked into admitting him by false statements, should be subject to punishment.

[ARCHIBALD, J. The statute says licensed premises shall not be kept open during certain hours. The policy of the Act is to prevent the evasion of its enactments which had occurred under the old Acts. The innkeeper is to open his house at his peril.

BLACKBURN, J. No question as to bona fides is raised on the case or left to us. If the innkeeper has been tricked into committing an offence the magistrates would mitigate the penalty.]

By s. 67 the smallest mitigation is 20*s*. At common law an innkeeper is indictable if he refuses to receive travellers: *Rex* v. *Ivens*. (3) And this was adverted to by the Court of Common Pleas in the cases already cited; and in *Morgan* v. *Hedger* (4) and *Copley* v. *Burton* (5) the Court adhered to their former decisions; and in the latter case intimated an opinion that the bona fides of the innkeeper was material to the question.

[BLACKBURN, J. Assuming that the clause, in s. 24, that none of the provisions shall preclude a man from selling liquor to bonâ fide travellers, means, to persons whom he bonâ fide believes to be travellers, still by subs. 4 of s. 51, the burden is on the appellant to prove this, and it does not appear from the case that he attempted to prove it.]

The case must be remitted to the justices to find this as a fact.

Willis, for the respondent.

(1) 17 C. B. (N.S.) 539; 34 L. J. (M.C.) 1.

(2) Law Rep. 4 C. P. 172.

(3) 7 C. & P. 213.

(4) Law Rep. 5 C. P. 485.

(5) Law Rep. 5 C. P. 489.

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[BLACKBURN, J. We are all agreed that, persons being found in the appellant's house supplied with liquor during the prohibited hours, the onus is on the appellant to show that they come within the exception. The question which we are not agreed upon and which we wished argued, is, how far an honest but mistaken belief is a defence; and, secondly, how far this belief appears on the statement of the case to have been established.]

It must be admitted that the case does not find the fact either way. But belief has nothing to do with the matter; the exception is that the persons supplied *are* bonâ fide travellers, and it lies on the appellant to prove this, which he failed in doing. The offence is keeping the house open during prohibited hours; and there are many cases in which a person may be guilty of infringing a statute without any mens rea: *Morden* v. *Porter* (1); *Hudson* v. *MacRae*. (2)

Poland, in reply, cited *Hearne* v. *Garton* (3), that a guilty knowledge is necessary to constitute the offence; and *Peplow* v. *Richardson* (4), as to what is a bonâ fide traveller.

BLACKBURN, J. The present information is under 35 & 36 Vict. c. 94, which repeals 11 & 12 Vict. c. 49; but to a certain extent the enactments of the two statutes agree. By s. 1 of the old Act, the sale of beer, &c., was prohibited during certain hours of Sunday, except as refreshment for travellers. There the exception was engrafted on the description of the offence; and under this section there were several decisions in the Court of Common Pleas, that the burthen of proof lay on the prosecutor of negativing the exception, and shewing that the persons supplied with liquor were not travellers; and in one case they intimated that the belief of the appellant was material, and that he could not commit the offence unless he knowingly kept his house open for others than travellers. (5) We need not inquire in the present case, whether those cases were or were not rightly decided. The decisions, no doubt, put great difficulty in the way of enforcing the Act, and enabled the persons licensed to keep open their houses with

(1) 7 C. B. (N.S.) 641; 29 L. J. (M.C.) 213.

(2) 4 B. & S. 585; 33 L. J. (M.C.) 65.

(3) 2 E. & E. 66; 28 L. J. (M.C.) 216.

(4) Law Rep. 4 C. P. 168.

(5) See: *Copley* v. *Burton*, Law Rep. 5 C. P. 489.

impunity during the prohibited hours. Accordingly, the new Act alters altogether the description of the offence in s. 24., introducing the exception in a subsequent clause. By the first clause, therefore, the offence is made to be the keeping open of the house at all during the prohibited hours; and a subsequent and distinct sentence says that this shall not preclude the sale of liquor to bonâ fide travellers. Thus the offence is created by the one part, and a ground of defence is given by the subsequent part, which according to all rules of pleading must be pleaded by the defendant. But the Act does not stop there; by subs. 4 of s. 51, it is enacted that "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant." This enactment certainly seems to be pointed against the decisions of the Court of Common Pleas with regard to s. 14 of Jervis's Act (11 & 12 Vict. c. 43), and to make it incumbent on the defendant to prove any exception in his favour. The magistrates therefore rightly held that it lay on the defendant to prove that the persons supplied with liquor were bonâ fide travellers; and the magistrates having found as a fact that they were not all bonâ fide travellers, the defendant failed in proving the exemption in his favour to its full extent. But, inasmuch as the Court of Common Pleas rested their decisions partly on the ground that an innkeeper was bound to receive travellers, and seem to have considered that the bonâ fide belief, on the part of the innkeeper, that the persons supplied with refreshment were travellers, would prevent him from being liable, I will not, on the case as now stated, decide whether such belief is sufficient excuse; though the inclination of my opinion is that it is not. For supposing an honest, though mistaken, belief to be an excuse, the burthen of proving this lies on the defendant, and he ought to have proved it, and in the present case there is evidence either way. The magistrates have not found as to the appellant's bona fides at all, and as it lay on the appellant, my impression is, the magistrates not having found either way, that the appellant did not raise the point or

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require it to be found. My Brother Quain thinks differently as to the materiality of the appellant's belief, and the case will, therefore, be remitted to the justices to find, on the evidence already before them, or upon fresh evidence, whether the defendant had a bonâ fide, though mistaken, belief that all the persons were bonâ fide travellers.

QUAIN, J. I quite agree that under the new Act the burthen of proof of any excuse lies on the defendant. On looking over the case, I cannot say whether or not the magistrates were of opinion that the appellant honestly believed that all his guests were bonâ fide travellers; they only find that the appellant, in their opinion, had failed to prove that all the persons were bonâ fide travellers; and I think after the decisions in the Court of Common Pleas, it is very important that we should decide this point upon a case properly raising it; and the case should therefore go back to have this found.

ARCHIBALD, J. It may be doubtful whether a bonâ fide belief on the part of the innkeeper that the persons were travellers, is sufficient excuse; but before proceeding to decide this it will be as well to have the case clear upon the point. Having regard to the fact that the burthen of alleging and proving any excuse lies on the appellant, whether such a bonâ fide belief is sufficient is a grave question and will make the decision very important. I therefore keep my mind open on the point, though at present I am rather inclined to think that the only excuse open to the defendant is to prove that th epersons were actually bonâ fide travellers.

PER CURIAM. The case will be remitted to the justices with the expression of the opinion of the Court.

The following was the formal order with which the case was remitted:—

The Court is of opinion that the onus of proof is upon the defendant. The case is remitted for the justices to determine, as a question of fact, whether the defendant had an honest, though mistaken, belief that the persons were all bonâ fide travellers. If the justices find in the affirmative, the case is to be returned to

the Court, who will then decide whether such belief does or does not constitute a good defence. Otherwise, conviction to be affirmed.

Case remitted accordingly.

Attorneys for appellant: *Gamlen & Son, for W. Cottrell, Birmingham.*

Attorneys for respondent: *Miller & Gane, for T. H. Gem, Birmingham.*

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June 16.

Quarter Sessions—Rule of Practice, requiring Entry of Appeal Three Days before Sessions.

A certificate for a licence having been refused at licensing sessions, all the preliminaries to an appeal to the next quarter sessions required by 9 Geo. 4, c. 61, s. 27, were duly observed; but at the sitting of the court the quarter sessions refused to allow the appeal to be entered on the ground that by a rule of the sessions an appeal must be entered and grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions; and the sessions made an order for 10*l.* costs to the respondents under 12 & 13 Vict. c. 45, s. 6, as on an appeal which had not been entered or prosecuted. This order having been brought up and a rule to quash it obtained:—

Held, that the rule of sessions amounted to imposing an additional condition to the appeal which the statute had not imposed, and was more than a mere rule of practice which it was competent to the sessions to make; and that the order for costs must be quashed.

RULE calling upon the justices of Northamptonshire to shew cause why an order made by them on the 17th of October, 1872, touching an appeal against the decision of certain justices of the county refusing John Pawlett a licence (sic) to sell exciseable liquors by retail should not be quashed.

The order had been brought up by certiorari, and it appeared from the affidavits that the justices in licensing sessions for the district of Oundle had in September, 1872, refused Pawlett a certificate; against which refusal due notice of appeal was given by him and recognisances entered into. The quarter sessions were held on Wednesday, the 16th of October, the first day for appeals being on the 17th. On the morning of that day, before the assembling of the Court, the appellant's attorney went to the clerk of

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the peace's office to enter the appeal, but he refused to enter it without an order of the Court, as there was a rule of practice of the sessions that "all appeals are to be entered with the clerk of the peace on the Saturday preceding the sessions at which such appeals are to be tried, and at the same time the grounds of such appeals are to be given to the clerk of the peace."

At the sitting of the Court, application was made by counsel for the appellant to enter and hear, or enter and respite the appeal; but the sessions refused to make such an order, and they ordered the appellant to pay to the respondent justices 10*l.* (an agreed amount) for their costs, and that on the payment of the 10*l.* the recognisances should be discharged. (1)

Merewether shewed cause. The quarter sessions have power to make rules to regulate the practice in proceedings before them, provided the rules are reasonable. There is nothing unreasonable in a rule that an appeal which it is intended to try should be entered three clear days before the sessions, which is all that this rule amounts to, Wednesday being the first day of the sessions. In *Reg.* v. *Derbyshire* (2) it is distinctly laid down by Crompton, J., that the quarter sessions have power to make rules as to when appeals shall be entered, and that this Court had no visitatorial power over the practice of quarter sessions, and the rule was only made absolute to enter the appeal on the ground that it did not distinctly appear what was the rule of sessions, or that the sessions had acted on it; and the decisions in *Rex* v. *Monmouthshire* (3) and *Reg.* v. *Montgomeryshire* (4) are to the same effect; and those cases in effect overruled *Rex* v. *Wiltshire*. (5) In *Reg.* v. *Montgomeryshire* (4) an appeal had been entered at the April sessions, and notice and grounds of appeal served fourteen days before the July sessions; but by the practice of the sessions twenty-eight days notice of trial had to be given in the case of appeals already entered and respited; and Wightman, J., in giving judgment, after going through the cases cited, says, "The result

(1) Under 12 & 13 Vict. c. 45, s. 6, which gives power to the quarter sessions to give costs on appeal, of which notice has been given, but which has not been entered or prosecuted.

(2) 22 L. J. (M. C.) 31.

(3) 3 Dowl. 306.

(4) 3 D. & L. 119; 14 L. J. (M. C.) 142.

(5) 10 East, 404.

of all of them is, that the quarter sessions are the proper judges of their own rules; and this Court will not interfere with their rules, unless they appear so unreasonable that they cannot be supported. Here the rule requiring twenty-eight days notice, though it seems unnecessary, is hardly so unreasonable that I ought to interfere." Those cases are much stronger than the present.

[BLACKBURN, J. But is this case the same in principle? Here the rule is as to the original entering of an appeal where the statute gives an appeal simply to the next quarter sessions.]

Litigants and their attorneys are bound to know the practice of the sessions; and it is most desirable that some notice of what appeals are to be heard should be given, in order that disinterested justices in sufficient numbers may attend. Secondly, the power to give costs when the appeal is not entered is expressly given in all cases by 12 & 13 Vict. c. 45, s. 6.

Sills, in support of the rule. The Court has already distinguished the cases cited, which are all cases in which the appeals had been entered, and the rule of practice simply applied to the hearing. There cannot be any formal entry of an appeal until the first day of sessions, when two or more justices have assembled.

[BLACKBURN, J., referred to *Reg.* v. *Deputies of Leicester.* (1)]

Rex v. *Norfolk* (2) is directly in point, that the sessions cannot impose an additional condition to an appeal beyond what the statute giving the appeal requires. The present is more than a mere rule of practice. The quarter sessions make it a condition precedent to the right of appeal by refusing to enter the appeal at all. The most they were entitled to do, if they thought it not proper to hear the appeal, was to enter and adjourn it to the next sessions, as Lord Denman, C.J., says in *Rex* v. *Norfolk.* (2) *Reg.* v. *Surrey* (4) is a late decision of Erle, J., to the same effect. That learned judge says: "In this case the appeal had been entered and respited, and all the notices required by the general law had been given. From the case of *Rex* v. *Norfolk* (2) I collect that the power of making rules of practice in respect of hearing an appeal does not extend to the creation of a condition distinct

(1) 15 Q.B. 671.
(2) 5 B. & Ad. 990.
(3) 6 D. & L. 735; 18 L. J. (M. C.) 175.

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from, and in addition to, the steps required by law, and to authorize the refusal of a hearing if such condition be not performed." So in *Rex* v. *Staffordshire* (1) Lord Denman, C.J., says: "The sessions have no right to introduce a new condition of appeal which is not in the Act of Parliament." In the present case, by 9 Geo. 4, c. 61, s. 27, an appeal is given to the next quarter sessions, unless such sessions are within twelve days of the act appealed against, in which case the appeal is to be to the next sessions after. So that this rule of quarter sessions might go to curtail the time for appealing to eight or nine days. As to the power to give costs, by 12 & 13 Vict. c. 45, s. 6, costs can only be given on proof of notice of appeal. No notice of appeal was proved before the sessions.

BLACKBURN, J. As to the last point, it is clear notice of appeal was, in point of fact, given on the appellant's own shewing; and if this objection had been taken at the sessions it would at once have been cured. On the main point, I have come to the conclusion that the sessions acted beyond their jurisdiction; and the order for costs must be quashed. It has been established by numerous cases that it is incident to the Court of Quarter Sessions to regulate its own practice; and there has been an apparent conflict as to how far the Court of Queen's Bench will entertain this question, and look into the matter, and exercise what has been called a visitatorial power over the rules which the sessions have made. In the case of a mere rule of practice the more recent cases seem to establish that this Court will not interfere unless it appear very unreasonable. But does the present rule amount to no more than a mere rule of practice? The Northamptonshire Quarter Sessions have made an order which amounts to saying that all appeals shall be entered four clear days before the day on which they are to be heard, or, which is the same thing, three clear days before the first day of sessions at which the appeal is to be tried. This may be a very convenient rule, if for no other reason, for that suggested by counsel, in order that the Court may be constituted of a sufficient number of disinterested justices. But the sessions have gone further than

(1) 4 A. & E. 842, 844.

refusing to hear. They have refused to allow the appeal to be entered at all. Possibly they had jurisdiction to refuse to hear; I say nothing as to whether under the circumstances they could not have adjourned. The appeal in the present case is regulated by s. 27 of 9 Geo. 4, c. 61. [The learned Judge read the section.] All the conditions required by that section had been complied with by the appellant; but the sessions have added to all these another condition. They say: "You shall enter the appeal with the clerk of the peace at least three clear days before the sessions to which you have a right to appeal, and if this is not done, we will neither hear you, nor allow you to enter the appeal." I cannot think that any case which has been cited establishes the right of the sessions so to act. I cannot think they have a right to insist on the entry of an appeal before the court to which the appeal is given is sitting. It is quite another thing to make a rule that an appeal shall be entered by a certain time on the first day of the sessions, although the hearing of appeals may not take place till the fourth day. If the sessions had no right to refuse to enter the appeal, it follows that they had no power to make the order for costs as upon an appeal not entered or prosecuted, and therefore the order must be quashed as beyond their authority.

QUAIN, J. The appeal is given by statute to the next quarter sessions, and it does not lie to a later session, and certain notices are to be given, and certain other conditions performed, all which the appellant had complied with. In my opinion, the sessions had no power to impose a fresh condition beyond that of giving the requisite notices; and they cannot add to that that the appeal must be entered three clear days before the sessions; and still further, that at the same time the appellant shall furnish the grounds of appeal. Now, if this is not required by the Act of Parliament, I do not see what power the sessions had to make the order. For if they can refuse to allow an appeal to be entered because it was not done three days before the sessions, they could equally refuse on the ground that the appellant had not furnished copies of the grounds of appeal. These seem to me to be conditions which they had no right to impose. The cases of *Rex* v. *Norfolk* (1) and

(1) 5 B. & Ad. 990.

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Rex v. *West Riding* (1) establish that the justices have no power to impose fresh conditions, and are strong to shew that if an appeal is granted in general terms to the next sessions, the justices have no power to refuse to enter an appeal because certain rules of practice, which are imposed as a condition precedent, have not been complied with.

Rule absolute.

Attorneys for appellant: *Taylors, Hoare, & Cooke.*
Attorneys for justices: *Tooke & Holland.*

June 6.

MILLS *v.* SCOTT.

County Court Act (19 & 20 *Vict. c.* 108, *s.* 57)—*County Court Rule* 122—*Parties to Action—Amendment of Description of Plaintiff—Contagious Diseases (Animals) Act*, 1869 (32 & 33 *Vict. c.* 70) *s.* 57—*Recovery of Expenses—Power of Local Authority to sue in their Local Name.*

By s. 57 of the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) any person exposing in a fair or other public place any animals affected with a contagious or infectious disease, is to be deemed guilty of an offence against the Act, unless he satisfies the justices before whom he is charged that he was ignorant that the animal was affected and could not with reasonable diligence have obtained the knowledge. The inspector of the local authority may seize any animal so affected and exposed, and in certain cases cause it to be slaughtered, and in other cases remove it to some convenient and isolated spot, there to be kept for such time as the local authority think expedient; "and the local authority may recover the expenses of the execution by them of this section from the owner of the animal."

An action was brought in a county court, in which "J. M., the inspector appointed by the local authority for the county of H., under the Contagious Diseases (Animals) Act, 1869," was plaintiff, and N. S. defendant; in the particulars the local authority claimed 4*l.* 10*s.* for the hire of a meadow for twenty-six days, and the keep and other expenses of certain animals seized under the above section.

The defendant had been summoned before justices for exposing the animals which were affected with a contagious disease; but the information was dismissed, on the ground that the defendant had not knowledge of it. Objection was taken by the defendant that the action ought to have been brought in the name of the local authority, and not of J. M., the inspector.

The judge, without the consent of the defendant, amended the summons by

(1) 5 B. & Ad. 667.

striking out "J. M." and substituting the "local authority for, &c." as plaintiffs under s. 57 of 19 & 20 Vict. c. 108, and rule 122 of County Court Rules, 1867; and gave judgment for the amount claimed:—

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Held, first, that the amendment, which was not a substitution of one plaintiff for another, but the amendment of the description of the plaintiff, was rightly made.

Secondly, that, though the local authority were not made a corporation, yet as s. 57 enabled them to "recover the expenses," they could maintain an action for them in their local name.

Thirdly, that the expenses were recoverable independently of whether the owner were convicted or not.

CASE on appeal from the County Court of Hertfordshire, holden at Hitchin.

An action was brought by "James Mills, the inspector appointed by the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act, 1869, plaintiff, against Nathan Scott, defendant."

The particulars of claim were: Mr. Nathan Scott, Ashwell, Herts., to the Local Authority for the County of Hertford, under the Contagious Diseases (Animals) Act.

		£	s.	d.
1872. Nov. 5th to Dec. 11th.	Hire of meadow twenty-six days for seven calves, at 1*s.* 9*d.* per day . .	2	5	6
	Nineteen trusses of hay	1	18	0
	Attendance, man for water, &c. . .		6	6
		4	10	0

At the hearing it appeared that the action was brought by the plaintiff to recover from the defendant the expenses of the keep of certain animals seized by Mills, in execution of the Contagious Diseases (Animals) Act, 1869, (32 & 33 Vict., c. 70), s. 57. (1)

On the part of the defendant the attention of the judge was

(1) By 32 & 33 Vict. c. 70, s. 9, and schedule 2, the local authority in counties are the justices in general or quarter sessions assembled.

Sect. 57: "If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale . . . any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge."

"When any horse or animal so affected is exposed or otherwise dealt with in contravention of this section, an inspector of the local authority authorized to act in execution of this Act may seize the same, and cause it, if affected with glanders, cattle plague, or sheep pox, to be slaughtered, and if affected with any other contagious or infectious disease,

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directed to the discrepancy between the summons and the particulars, namely, that by the summons the plaintiff James Mills sued in his own name, but that by the particulars annexed to the summons the amount sued for was claimed to be due "to the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act."

Evidence was given to shew that the plaintiff had inadvertently applied for the summons to be issued in his own name, contrary to the instructions he had received from the clerk of the peace.

The judge, with the consent of plaintiff's counsel, but without the consent and against the contention of the defendant's advocate, amended the summons and proceedings by striking out James Mills as plaintiff and substituting as plaintiffs "the local authority for the county of Hertford under the Contagious Diseases (Animals) Act, 1869," assuming that he could do so by virtue of the powers given him by s. 57 of 19 & 20 Vict. c. 108, and No. 121 of the Rules for the County Courts, 1867.

It was further contended by the defendant's advocate that assuming the judge had power to amend the summons and proceedings as aforesaid, the proper names of the persons constituting the local authority must be given, they not being a corporation.

It was admitted on the part of the defendant that some of the cattle mentioned in the particulars were afflicted with foot and mouth disease at the time the same were seized by Mills.

It was admitted on the part of the plaintiff that the defendant had been summoned to appear before justices for exposing the animals mentioned in the particulars, in alleged contravention of the Contagious Diseases (Animals) Act, 1869, s. 57, and that the defendant had shewn, to the satisfaction of the justices, that he did not know of the animals being so afflicted, and that he could not with reasonable diligence have obtained such knowledge; and that thereupon the summons and complaint were dismissed.

It was admitted by Mills that he had been paid by the local authority, before action brought, the amount for which the defendant was sued.

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to be removed into some convenient and isolated place, and to be there kept for such time as the local authority think expedient; and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal. . . ."

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It was contended for the defendant that, the justices having dismissed the summons and complaint against the defendant, there was no such contravention by him of the Contagious Diseases (Animals) Act, 1869, as would render him liable for the care and keep of the animals during the time of their detention.

Judgment was given for the substituted plaintiffs; leave being granted to state a case for appeal.

Grantham, for the defendant. The judge had no power to amend within s. 57 of 19 & 20 Vict. c. 108; nor did rule 121 of the County Court Rules, under which he assumed to act, give him power to substitute one plaintiff for another (1); neither does rule 122 give him this power: *Clay* v. *Oxford*. (2)

[BLACKBURN, J. There was no prejudice to any one; everybody knew who was really suing; the alteration was not the substitution of one plaintiff for another, but rather the correction of the description of the plaintiff. The Court of Common Pleas, in the very recent case of *Bolingbroke* v. *Townsend, Clerk to the Swindon Local Board* (3) upheld an order of mine substituting in the writ of summons the name of the Local Board as defendants.

QUAIN, J., referred to *La Banca Nazionale* v. *Hamburger*. (4)]

Secondly, the local authority under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) are not made a corporation, and therefore the substituted plaintiffs cannot sue in a corporate name, but must sue in their individual names. By s. 9 and sch. 2, the local authority are the justices in general or quarter sessions.

[BLACKBURN, J. Section 57 says that "the local authority may recover the expenses of the execution by them of this section from the owner of the animal;" it follows, that if no other remedy is given, the local authority must be entitled to sue for them.]

Lastly, as the complaint against the defendant was dismissed by the justices, he cannot be liable.

Graham, for the plaintiffs, was not heard.

BLACKBURN, J. The amendment was really not the substitution of one plaintiff for another, but the amendment of the description

(1) Rule 121 is that mentioned in the case; but rule 122 seems to be the rule most applicable. See *Davis'* County Courts, 4th ed. p. 266.

(2) Law Rep. 2 Ex. 54. 12 Jur. N.S. 944

(3) Law Rep. 8 C. P. 645.

(4) 2 H. & C. 330.

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of the plaintiff, which the judge has clearly power to make. On the second point, the local authority are not, it is true, made a corporation by the Act, nor is it said that they may sue in their collective name, but it is expressly said by s. 57, that the local authority may recover the expenses from the owner, and therefore, by necessary implication, they can maintain an action for them. Lastly, by s. 57, any person exposing in a public place an animal affected with a contagious disease, shall be deemed guilty of an offence against the Act, unless he proves to the satisfaction of the justices that he was ignorant of the animal being so affected, and could not with reasonable diligence have obtained the knowledge. The section goes on to enable the inspector to seize, and either kill or remove the animal affected, and the expenses of the execution of the section may be recovered from the owner; this is quite independent of whether the owner is convicted or not. The county court judge was therefore right in giving judgment for the local authority.

QUAIN, J. The statute by s. 57, gives power to the local authority to recover the expenses; and no special remedy being given, the only way they can recover is by suing in an action. They are in effect made a quasi corporation for this purpose, in the same way as churchwardens are made a body in the nature of a corporation for certain purposes under 59 Geo. 3, c. 12, s. 17. As to the power of amendment, *La Banca Nazionale* v. *Hamburger* (1) is in point. There, it is said by Pollock, C.B.: "Some corporations are entitled to sue in their corporate name, others in the name of a particular officer. Now, suppose a corporation sued in its corporate name when it ought to have sued in the name of an officer, why should not the writ be amended? It is not adding a new plaintiff, but correcting a mistake in the name." As to the last point, the expenses are recoverable under s. 57, altogether independently of whether the owner of the diseased animals be convicted or not.

ARCHIBALD, J., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Nicholson & Herbert.*

Attorney for defendant: *William Maynard.*

(1) 2 H. & C. 330, 331.

THE QUEEN *v.* FORDHAM AND OTHERS, JUSTICES OF HERTFORDSHIRE. 1873 *June* 16.

Poor Law Audit—11 & 12 *Vict.* c. 91, s. 9—*Enforcing Payment against defaulting Overseer*—*Certificate of Treasurer not conclusive Evidence of Nonpayment.*

A Poor Law audit of parish accounts up to the 29th of September was held in the ensuing January, and 139*l.* was certified by the auditor as due from the overseer. A warrant of distress was then applied for under 11 & 12 Vict. c. 91, s. 9, to enforce the payment; and at the hearing of the information a certificate of the treasurer of the union was produced, which, by that section, is sufficient proof that the money had not been paid within seven days after it had been certified, nor within three days of laying the information. The overseer proved that he paid 84*l.* to the treasurer in October on account of the 139*l.*; and the justices refused to issue their warrant for more than the balance:—

Held, that the justices were right: for that the certificate of the treasurer was only primâ facie evidence of the nonpayment, and it was open to the person surcharged, to shew what he had paid, if he could do so without contradicting the auditor's certificate.

RULE calling on certain justices of Hertfordshire, to shew cause why they should not issue their warrant to levy on the goods of John Goffage, assistant overseer of the parish of Ashwell, 139*l.* 9*s.* 10*d.*, the amount certified by E. B. Prest, the Poor Law auditor of the Cambridgeshire and Huntingdonshire district, to be due from Goffage to the treasurer of the Royston Union.

It appeared from the affidavits that an information was laid on the 17th of January, 1873, against Goffage, alleging that he had not paid the above sum, certified by the auditor in the collecting and deposit book of the overseers of the parish to be due from Goffage, at the audit of the accounts of the union and of the parishes contained in it, held on the 8th of January, 1873, within seven days after the same had been certified to be due, nor within three clear days before the laying of the information. (1)

(1) By 11 & 12 Vict. c. 91, s. 9. "In any proceedings to be taken by an auditor or by his attorney, before justices, to recover sums certified by him to be due, it shall be sufficient for him to produce a certificate of his appointment under the seal of the Poor Law commissioners, or of the commissioners aforesaid, and to state and prove that the audit was held, that the certificate was made in the book of account of the union or parish to which the same relates, and that the sum certified to be due had not been paid to the treasurer of the guardians of the union or of the parish, as the case may be, within seven days after the same had been so certified, nor within three clear days before the laying of the information, of which nonpayment a certificate in

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At the hearing, on the 5th of February, 1873, the auditor proved the making of his certificate; and he put in a certificate purporting to be signed by the treasurer of the union as proof of the nonpayment of the above sum. It was proved or admitted that although the audit was held on the 8th of January, 1873, the auditor only audited the accounts up to the 29th of September, 1872, and the 139*l.* was certified as due up to that date; and Goffage deposed that he paid 84*l.* 18*s.* 1*d.* on the 16th of October, 1872, to the treasurer in part discharge of the 139*l.* The justices, after taking advice, were of opinion that, although the auditor's certificate was conclusive, unless appealed against, as to the amount due on the accounts audited, yet the certificate of the treasurer was only primâ facie evidence as to the nonpayment, and was open to be rebutted by other evidence; and Goffage having proved to their satisfaction the payment of the 84*l.*, so that 54*l.* odd only was due, the justices refused to issue their warrant for more than that balance, and the auditor declining to ask for a warrant to enforce payment of that amount, the justices refused to issue any warrant.

The justices did not appear to shew cause, but filed an affidavit under 35 & 36 Vict. c. 26, setting forth the above grounds of their decision.

Bromby supported the rule, and contended that the certificate of the treasurer was conclusive; all the justices had to do was to see that the statutable proof required by s. 9, of 11 & 12 Vict. c. 91, had been given; and they could not go into the accuracy of the certificate, the only mode of disputing it being by certiorari to this court under 7 & 8 Vict. c. 101, s. 35. He cited *Reg.* v. *Linford* (2), and *Reg.* v. *Finnis.* (3)

writing, purporting to be signed by the treasurer, shall be sufficient proof on the part of the auditor; and if at the hearing of such information it shall be proved that the said sum had been paid to the treasurer subsequently to the date of such last mentioned certificate, the costs incurred by such auditor shall be paid by the party against whom the information shall be laid, unless he prove that notice of such payment had been given to the auditor twenty-four hours at least prior to the laying of the information.

(2) 7 E. & B. 950.

(3) 1 E. & E. 935; 28 L. J. (M.C.) 201; 5 Jur. N.S. 791.

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BLACKBURN, J. The cases cited shew that the certificate of the auditor as to the accuracy of the surcharge can only be disputed on appeal to this court under the statute; but the justices when asked to issue their warrant are not mere conduit pipes; they have a duty to perform, and they can only issue their warrant when it is sufficiently proved that it is their duty to issue it in accordance with the information. [The learned judge read s. 9 of 11 & 12 Vict. c. 91.] The justices therefore, have to see whether at the time of hearing the money has not been paid. As to this the certificate of the treasurer is sufficient primâ facie evidence; but it is not made conclusive, and it would be absurd if it were, and that the justices were bound to issue their warrant though in fact the overseer had paid every farthing. The statute merely means that the certificate shall be primâ facie sufficient; and the justices are only to issue their warrant for what it is proved remains due at the time of hearing. Here the justices have found, and we must assume rightly, that 84*l.* was paid after the date of the accounts,—that is the 29th of September, 1872,—which were audited on the 8th of January. And taking the justices' finding to be right in fact, 84*l.*, part of the 139*l.*, had been paid, and they were not bound to issue their warrant for more than the balance.

QUAIN, J. There seems to me to be not the slightest pretence for the application; and the rule ought never to have been granted. The overseer admits the validity of the auditor's certificate, and shews, as matter subsequent, that he paid 84*l.* on account in October. The justices were therefore clearly not bound to issue their warrant for more than the balance.

Rule discharged.

Attorneys for auditor: *Sharpe, Parkers, & Co.*

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June 17.

[IN THE EXCHEQUER CHAMBER.]

JONES AND WIFE *v.* CUTHBERTSON.

Parties to Action—Husband and Wife—Money borrowed for Wife's separate Use.

A married woman had freehold and leasehold property devised to her separate use, and she being desirous of building and repairing some cottages upon part of it, and her husband wanting to pay off a debt, it was arranged, under the advice of the defendant, their solicitor, that a loan of 550*l.* should be raised by the mortgage of the wife's property, and the deposit of two policies of the husband of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, and a joint authority, signed by husband and wife, was given to the defendant to receive the first instalment from the mortgagees. He received it and paid the husband's debt, but he claimed to retain the balance for a debt due to him from the husband. An action was then brought by the husband and wife for the balance:—

Held, affirming the judgment of the Court of Queen's Bench, that, on the facts, the joint action could be maintained.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the plaintiffs. (1)

The declaration was by Thomas Jones and Rhoda Celia, his wife, for money payable by the defendant to the plaintiffs, for money received by the defendant for the use of the husband and wife, in right of the wife alone, she being then entitled to the same for her sole and separate use, free from and independent of her husband, and for the recovery of which she had a right to sue the defendant; claim 70*l.* 8*s.* 7*d.*

Pleas:—Never indebted, and payment; on which issue was joined.

At the trial at the Glamorganshire Spring Assizes, 1871, before Mellor, J., the following were the facts proved:—The plaintiffs reside in the town of Neath; they were married on the 9th of May, 1869; no settlement was at any time made on the marriage. The defendant is a solicitor in the same town.

Before and at the time of the marriage, William Hopkins, the father of the female plaintiff, was seised of certain parcels of

(1) Law Rep. 7 Q.B. 218.

land with houses erected thereon, situate in the town of Swansea, for the lives of certain persons still surviving, and a term of years, and was also possessed of certain parcels of land, with certain buildings erected thereon, situate in the town of Neath, for a term of years still unexpired.

William Hopkins, by his will dated the 13th of May, 1838, gave, devised, and bequeathed, all his real and personal estate unto his daughter (then Rhoda Celia Hopkins) for her own use, and declared that the real and personal estate, devised and bequeathed to his daughter, should be for her sole and separate use, free from the control, debts, and engagements of any husband; and he appointed her sole executrix.

The testator died on the 24th of February, 1870, without altering or revoking his will, and it was afterwards proved by the female plaintiff, the executrix.

In the course of the summer succeeding the testator's death, the male plaintiff being indebted to Messrs. Franklyn and other persons, was desirous to pay Messrs. Franklyn's debt, and the female plaintiff was desirous to raise money to build or repair some cottages on the property at Neath devised to her separate use. With a view to raise money to effect these objects they consulted the defendant, who was their solicitor, and by his advice entered into a negotiation with "The Union Finance Company, Limited," for a loan of 550*l.* on the security of the said landed property, and also of two policies of insurance of the male plaintiff, of 500*l.* each, one on his own life, and the other on the life of his wife. The transaction was afterwards carried out, the company consenting to advance the 550*l.* on mortgage.

A deed between the plaintiffs and the company was accordingly prepared and executed on the 2nd of July, 1870, to effect the above objects, by which the husband covenanted for the repayment of the mortgage loan with interest; and the 550*l.* was to be advanced by instalments, the first of 150*l.* to be paid at once.

On the 1st of July, 1870, the following authority was given to the defendant to receive the first instalment of 150*l.*:—

We, the undersigned, do hereby authorize you to receive of and from the Union Finance Company Limited, Bristol, or their soli-

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citors, the sum of 150*l.* (less solicitor's charges), being the first instalment on account of a loan of 550*l.*, which the said company have agreed to lend us on the security of property situate in Neath and Swansea, Glamorganshire, and for your so doing this shall be your sufficient authority.

Dated 1st July, 1870. Thomas Jones, Junr.
Rhoda Celia Jones.

Part of the 150*l.* was to have been applied in discharge of the debt of the male plaintiff to Franklyn; the remainder was to have been applied to the erection of cottages. The first instalment of 150*l.*, less mortgagee's solicitor's charges, was paid over to the defendant by the company (1), and out of the same he retained the sum of 70*l.* 8*s.* 7*d.* for money due to him for a bill of costs for professional services theretofore rendered by him to the male plaintiff, and for money paid by the defendant for the use of the male plaintiff at his request; on which the present action was brought by the plaintiffs jointly for its recovery.

On objection taken that the husband ought to have sued alone, the learned judge nonsuited the plaintiffs, but gave them leave to move to enter a verdict for 70*l.* 8*s.* 7*d.*, if there was any evidence proper to be left to the jury in support of their claim, with leave, if necessary, to make any amendments in the pleadings which he ought to have made, consistent with the facts proved and with the retaining of the same parties on the record.

A rule was obtained accordingly, which was afterwards made absolute.

The question for the opinion of the Court was whether, on the facts above stated, the plaintiffs are or are not entitled to sue jointly for the recovery of the 70*l.* 8*s.* 7*d.*

Manisty, Q.C. (*Hughes* with him), for the defendant. The declaration is bad on the face of it; at all events it is not supported by the facts. No action, however, at law could be maintained jointly

(1) The net amount received by the defendant was 139*l.* 17*s.*; out of this he paid the debt to Messrs. Franklyn of 28*l.* 4*s.* 10*d.*, and he sent the plaintiffs a cheque for 28*l.* 19*s.* 5*d.* The plaintiffs gave credit for a further sum of 12*l.* 4*s.* 2*d.* for the defendant's costs, making together 69*l.* 8*s.* 5*d.* and leaving a balance of 70*l.* 8*s.* 7*d.*, the sum sued for. See the facts as thus stated in the Court below, Law Rep. 7 Q. B. at p. 221.

by husband and wife on the facts. Possibly there may be a remedy by resort to a court of equity, but that is not the present question. The husband here was a party to the contract, he deposited policies and covenanted to repay the money: consequently, when obtained, although partly on the security of the wife's property, it was his money; and it is a fallacy to say that it is a chose in action of the wife in which the husband may join the wife if he chooses. In 1 Roper on Husband and Wife, 2nd ed., p. 220, it is laid down, "If the husband receive the money, legacy, or duty which was owing to the wife, or if he alone or he and his wife authorize a person to receive, who actually obtains it, either of those receipts will change the wife's interest in the property, and be a reduction of the chose in action into the possession of the husband divested of her title to it upon surviving him; and he may maintain an action for the money so received by the person authorized as above." The law is similarly laid down in 1 Williams' Executors, 4th ed., p. 718; 7 ed., p. 846.

[MARTIN, B. The wife is, in part at least, the meritorious cause. No one disputes that the husband might sue alone; but the question is whether he may not join the wife, or whether he is compelled to exercise his marital right.]

The receipt of the money by the defendant, though on the joint authority of husband and wife, became the receipt of the husband, and is ipso facto a reduction into possession whether he will or not; and this is the effect of the judgment in *Bidgood* v. *Way* (1); in *Cosio* v. *De Bernales* (2) Abbott, C.J., laid down the law in similar terms. In *Abbot* v. *Blofield* (3), and *King* v. *Basingham* (4), it was expressly decided that a declaration for money had and received laying the damage ad damnum ipsorum could not be maintained; in other words, that money received to the use of the husband and wife, or of the wife alone, is in fact money received to the use of the husband, and he must sue alone. This is not a mere technical objection; on the facts a loan to the husband and wife is shewn, and as soon as lent it is the husband's alone, and therefore, when received by the defendant as agent of the husband and wife, it was the husband's money. This at once distinguishes the case

(1) 2 W. Bl. 1236.
(2) Ry. & Mood. 102.
(3) Cro. Jac. 644.
(4) 8 Mod. 199, 341.

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from *Flood* v. *Perrins* (1) in this court; there the money was received by the defendant from a third person, and he was not the agent of the husband or wife. It is a fallacy to say this money was the produce of the wife's separate estate; it was a loan to husband and wife, and therefore to the husband alone, on the several securities given by each.

[BRETT, J. Is it not money advanced partly on the security of the wife's separate property? And if so, is she not in part the meritorious cause of action? In 1 Roper on Husband and Wife, p. 213, it is said: "In actions arising from contract subsequently to the marriage, where the promise is made to the wife alone, or to the husband and wife, and where the consideration moves wholly or in part from the wife, or where she is, as it has been expressed, the meritorious cause of action, the husband may assent to give her an interest in the contract, and join her with him in the action." That seems precisely to touch the present case. The husband might sue alone; but has he not a right to join the wife if he chooses?]

On the facts the money had become the husband's on the receipt of it by the defendant as his agent. And it is no longer a chose in action of the wife in which the husband may assent to give her an interest. That is the strict legal position: the position of the parties in equity is beside the question.

H. S. Giffard, Q.C. (with him *B. Francis Williams*), for the plaintiffs, was not heard.

KELLY, C.B. I am of opinion that this judgment must be affirmed upon the short and simple, but conclusive ground, that when the consideration moves from the wife, either wholly or in part, or, in other words, when she is the meritorious cause of action, the husband may assent to the wife taking an interest in the contract, and join her in the action. This appears here, both on the declaration and on the facts, though they are not quite consistent. *Bidgood* v. *Way* (2) has been much relied upon, but we must look at the declaration in that case, and it was simply for money had and received; there was a count for use and occupation, but the damages being general, the plain-

(1) Law Rep. 4 Q. B. 500. (2) 2 W. Bl. 1236.

tiffs (the defendants in error) were bound to support both counts, so that it may be taken to be the case of money had and received simpliciter. The Court of Exchequer Chamber gave judgment for the defendant (the plaintiff in error), and the case is a direct decision to this extent only, that an action at law for money had and received to the use of the husband and wife simpliciter is not maintainable; and no doubt this is commonly held to be the law. But when the wife is the meritorious cause of action, an action may be maintained in the joint names of husband and wife, provided this appear on the record as well as in fact; and there is nothing in this qualification inconsistent with the decision in *Bidgood* v. *Way* (1), or in *King* v. *Basingham*. (2) In *Bidgood* v. *Way* (1) several cases of contract were cited, in which an action had been maintained by husband and wife jointly: *Abbot* v. *Blofield* (3); *Brashford* v. *Buckingham* (4); *Fosset or Fawcett* v. *Childers* (5); in all of which it was held that, the wife being the meritorious cause, she might be joined in the action at the election of the husband. And in delivering the judgment of the Exchequer Chamber, Skynner, C.B., says: "The cases cited for the defendant in error, where the wife is sometimes joined, do not controvert the doctrine laid down. They only shew that in such cases, so expressly stated, the husband may assent to give the wife an interest in the contract, and may join her in the action." In the present case the wife would have been wholly the meritorious cause, as the money was borrowed on the security of her separate property, except for the fact of the husband also joining in the deed under which the money was borrowed; but it is enough that she is in fact the meritorious cause, and this appears on the declaration. It alleges that the husband and wife sue for money received to the use of the husband and wife; if it had stopped there, it would have been bad within the decision of *Bidgood* v. *Way* (3); but it goes on to allege, in the right of the wife alone, she being then entitled to the same for her sole and separate use, free and independent of her husband. It is true that this statement is not strictly accurate in point of law upon the

(1) 2 W. Bl. 1236, 1239.
(2) 8 Mod. 341.
(3) Cro. Jac. 644; 2 Roll. Rep. 250.
(4) Cro. Jac. 205.
(5) 1 Roll. Abr. 32, pl. 12.

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facts; as matter of law the wife was not strictly entitled to the money until it had been applied to its destined purpose; but she was entitled so far as this, that the facts would have entitled her to an injunction if the husband or the defendant had refused to apply it to the purpose for which it had been borrowed on the mortgage of her separate property. She wanted to lay out money in improving her separate estate, and the money was advanced on the security of this property. The defendant knew that the money was borrowed for this purpose alone; and the defendant, when he received the money on the order of the husband and wife, had no right to apply any part of it to the payment of his own debt from the husband, and equity would have restrained him from so doing; but he also held the money under an implied contract in law, that he would not himself apply it to any other purpose than that agreed to and directed by husband and wife. But it is said that the money as soon as it was received was the husband's, and that part was to be applied to the payment of the husband's debt. No doubt the defendant received it for that purpose, but he also received it in effect for the express purpose of applying it to the repair of the buildings on the wife's separate property; and it would not have been received at all without her express authority. It was, therefore, money received to the use of the husband and wife in respect of a contract in which the wife was at the very least a chief part of the meritorious cause; and it is impossible to maintain that she was not. Therefore the case comes within the exception to the general rule, and the action is jointly maintainable by husband and wife.

I wish to add one word as to the late case of *Fleet* v. *Perrins* (1) in this court. The results of all the authorities are correctly stated by my Brother Cleasby. He says: "Marriage, no doubt, operates as an unqualified gift of all the wife's chattels to her husband; but as to choses in action, it is qualified by the condition that he reduces them into possession during the coverture. This is laid down as recognised law in Com. Dig., Baron and Feme (E. 3); and this applies not only to choses in action given to the wife before marriage, but also to those which are created after the marriage, to all, if you can properly call them choses in action, to all cases in

(1) Law Rep. 4 Q. B. 500, 507-8.

which the wife is the meritorious cause of action." And again, after stating the facts: "If the money had been paid in to a bank used by the husband and wife, or if the defendant had been the wife's agent to receive the money, so that the receipt by him would have been the receipt of the wife, that would have been quite a different matter, the money would have been received by the wife, and, consequently, absolutely the husband's; but all the wife had here was a bare chose in action, which was never reduced into possession." I thought that the money was actually received by the defendant as agent; and I doubted whether there was enough on the facts to take the case out of the authority of *Bidgood* v. *Way* (1), and I dissented on this ground from the view of the rest of the Court; but most of the Court were agreed, as I am disposed to agree now, that if the wife was wholly or in part the meritorious cause of action the action would lie; and we are enabled to amend the declaration according to the facts, so that my objection wholly disappears, and I agree that it is competent to the husband to give her an interest in the contract and join her in the action. The judgment of the Queen's Bench must be affirmed.

MARTIN, B. I am of the same opinion, and on very simple grounds. All technicalities are now abolished, and we have not to consider whether it was technically money had and received ad damnum ipsius or ipsorum; any amendment may be made in the declaration to meet the facts. Now the real facts are, that this money was by all parties treated as the wife's; it was procured by the pledge of the property which she held to her separate use. What rule of law, therefore, is there against the wife joining in this action, when it is admitted that in some cases a wife *can* be considered as the meritorious cause of action, and in such cases the husband may either sue alone or join his wife? That is the plain common sense of the matter, and the judgment for the plaintiffs must be affirmed.

BRETT, J. As I understand the question before us, it is whether, on the facts, there was evidence to support a joint action by husband and wife on a declaration disclosing the true facts. Now the

(1) 2 W. Bl. 1236.

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only contract on the part of the defendant was a contract to pay over the money which he had received for the husband or for the husband and wife; and it is not proved, as stated in the declaration, that she was entitled to the money for her sole and separate use. But I think that the facts disclose a good cause of action in the husband and wife jointly. No doubt, and it has not been denied, the husband might have sued alone; but the question is, whether he may not give his wife an interest in the contract which has been entered into with the defendant. Now the facts are, that the money could not have been obtained except by the wife's separate property being given, at all events, as part of the security; and the authority given to the defendant to receive the money was, in fact, by husband and wife, with the express understanding and consent of all parties that part was to be applied to pay a debt of the husband, but the chief part to be expended on the separate property of the wife. It may be fairly stated, as a proposition of fact, that by the contract, made subsequent to marriage, there was an implied promise on the part of the defendant with each to carry out the intentions of the husband and wife. The money would never have been paid by the loan society to the defendant but for the security of the wife's property and the joint authority given to the defendant by the husband and wife; and it may be properly stated that the wife was, in fact, the meritorious cause of action, which brings the case within the proposition laid down in Roper in the passage which I have cited, p. 213; for which is cited as authority *Rose* v. *Bowler*. (1) The point was not directly decided in that case, but the inference drawn may fairly be drawn from the judgment, where it is said, "The rule is, that when the wife is the meritorious cause of action, there she may join with her husband, but not otherwise, as is evident from the authorities of *Abbot* v. *Blofield* (2) and *Weller* v. *Baker*." (3) Therefore it seems to me that on the facts the declaration might be framed something to the following effect: that the plaintiffs sue for money payable by the defendant to the plaintiffs, for money received by the defendant to the use of the husband and wife, which money had been raised partly on the security of the wife's

(1) 1 H. Bl. 108, 114. (2) Cro. Jac. 644.
(3) 2 Wils. 414.

separate property, and not otherwise, and which money was raised for the purpose partly of being laid out on the wife's separate property. I think such a declaration, which is clearly supported by the facts, would be good in law consistently with all the authorities.

CLEASBY, B. The declaration has been framed to escape the difficulties of *Bidgood* v. *Way*. (1) I think the declaration can be supported by the facts even as it stands. It was money received by the defendant to the use and in respect of the chose in action of the wife, and not in respect of any property which had been reduced into possession by the husband. If the husband could have reduced the property which was mortgaged into possession it might have been different; but being left to the separate use of the wife, he had no power over it. No doubt there are the policies pledged by the husband and his covenant to repay the mortgage money; but this money was really raised by the mortgage of the wife's property; and the question is, had the money been in any way reduced in possession by the husband before or since it was received by the defendant? This is matter of intention. Before the money came into the defendant's hands it clearly had not been reduced into possession. And the joint authority seems distinctly to negative any such intention. The form of the authority coupled with the facts known to the defendant shews this: "We authorize you to receive the money lent to us on the security of the wife's property for the purposes of which you are aware." Therefore the authority to receive and the receipt by the defendant was only for the particular purpose of paying a specific debt of the husband and of laying out the rest on the property of the wife. How could this be a reduction into possession by the husband? It lies upon the defendant to make out the proposition, and he cannot do so against the express intention of the husband not to reduce it into possession.

GROVE, J. I am of the same opinion. The passage from Roper which my Brother Brett has referred to is strong in support of the proposition that the action may be joint where the consideration moves from the wife, and that passage was probably in the mind of

(1) 2 W. Bl. 1236.

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the learned judge, or at any rate receives confirmation from the dictum of Willes, J., in *Fleet* v. *Perrins*. (1) "There is a class of cases of contract in which the husband may elect to allow the wife an interest and join her in the action, or he may sue alone; but if he dies without having commenced an action in his own name, the right survives to the wife." And again, *Bird* v. *Peagrum* (2) having been cited: "The money had been actually received by the wife, and was clearly the husband's as soon as it came to her hands; but if money be paid to a third person for the use of the wife, is it more than a chose in action?" The decision in *Fleet* v. *Perrins* (3) points out that the receipt of money of the wife by a third person under circumstances similar to the present is not a reduction into possession by the husband; and the only difference in the present case is that the third person is more in the nature of an agent than in *Fleet* v. *Perrins* (3); but if the defendant be the agent it must be to act as agent to receive and appropriate the money in the way in which the implied agreement under which he was constituted agent contemplated. The defendant was only agent for that particular purpose. The money was received alio intuitu, and with no intention by the husband to reduce it into his own possession. There was therefore no reduction into possession by the husband, and consequently the wife might be joined in the action, as Willes, J., points out.

DENMAN, J. The only question for us is whether the plaintiffs can sue jointly for this money in the hands of the defendant. The authorities cited are abundantly clear that in many cases of contract after marriage husband and wife can join, and I agree with the Lord Chief Baron on the general law as applicable to the case; and, as I understand his judgment, my Brother Martin does not disagree. I think the case can be put shortly thus: Can the defendant set up the husband's jus mariti? I think not, where the husband has expressly refrained from doing so. I adopt what is said by the Court below. "When the husband and wife signed the joint authority to the defendant to receive the first instalment, he was well aware that, with the exception of the debt to

(1) Law Rep. 4 Q. B. at pp. 502, 503.

(2) 13 C. B. 639; 22 L. J. (C.P.) 166.

(3) Law Rep. 4 Q. B. 500.

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Messrs. Franklyn, the residue of the money was to be applied wholly for the benefit of the wife, and he became the agent to both the plaintiffs to carry that purpose into effect. The money, therefore, when received by him, was received simply as agent for the husband and wife, to carry into effect their several objects, and he could not, against the will of the parties, treat the transaction as a reduction into possession by the husband, on his own account and for his own purposes; and he had no right, therefore, to set up, as answer to the present action, that the money, when it got into his hands, was the money of the husband only." (1) On that doctrine, therefore, of an estoppel against the right of the attorney to set up the jus mariti, the case may be decided independently of the general law.

Judgment affirmed.

Attorneys for plaintiffs: *Bell, Brodrick, & Gray.*
Attorney for defendant: *E. Peacopp.*

THE QUEEN ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE HACKNEY UNION, RESPONDENTS; *v.* THE ABNEY PARK CEMETERY COMPANY, APPELLANTS.

June 7.

Poor-rate—Cemetery, Occupation of—Principle on which to be rated.

The appellants were a company that purchased lands and laid them out as a cemetery. They received fees for interments and conveyed plots of ground to be used as graves. In one year 2333*l.* was received by the company as purchase-money for such plots of ground. Each plot was conveyed by indenture purporting to grant it in fee simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the company, and, subject to such trusts, in trust for the company as part of their property. The defendants were rated as the occupiers of the lands, and upon the principle that the sum of 2333*l.* was to be treated as part of the annual value of the occupation of the lands by the appellants in that year:—

Held, on the authority of *Reg.* v. *St. Mary Abbot's* (12 A. & E. 824), that the defendants were in occupation of the plots of ground which had been sold; and that the principle upon which they were rated was correct.

On an appeal against the decision of the Assessment Committee of the Hackney Union, altering an assessment in the new valuation list for the parish of Stoke Newington, made under the

(1) Law Rep. 7 Q. B. at p. 223.

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Valuation Metropolis Act, 1869 (32 & 33 Vict. c. 67) the General Assessment Sessions for the Metropolis confirmed the assessment, subject to the following case:—

1. The Abney Park Cemetery Company is a co-partnership duly formed under a deed of settlement of the 11th of September, 1839, which deed was executed by all the partners of the co-partnership. Under the provisions of the deed the company has purchased lands and laid them out as a cemetery, and has erected buildings, and catacombs, and vaults therein for cemetery purposes, and has inclosed the same. The company carries on there the business of a burial company for profit in connection with the cemetery.

2. The company charges and receives sums of money for the interment of bodies in graves, and the deposit of bodies in vaults and catacombs, for the re-opening of the same for the proprietors thereof, and making further interments therein, and for the performance of divine worship. The company also from time to time sells plots of ground for family graves.

The form of conveyance is as follows:—

This indenture, made the day of A.D. 18 , between the trustees and directors of the Abney Park Cemetery Company of the first part, of the second part, and the said , the chairman of the board of directors of the said Abney Park Cemetery Company, and one of the officers to sue and be sued on behalf of the said company of the third part, witnesseth that in consideration of *l.* to the said (trustees and directors) paid by the said they the said (trustees and directors) do, by these presents (made in the pursuance of the Act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties), release and confirm unto the said and his heirs all that plot of ground numbered in square No. in the Abney Park Cemetery, in the parish of St. Mary Stoke, Newington, in the county of Middlesex, containing feet in length and feet in width, to hold the said plot of ground unto the said , his heirs and assigns for ever; but nevertheless upon trust and to the intent that he the said , his heirs and assigns, may (subject nevertheless to the rules and orders for the time being of the said company for the management and regulation of the said cemetery, and the catacombs and vaults therein) erect or construct a vault or mausoleum in or upon the same, and may use the said plot of ground (vault or mausoleum) as and for a place of burial for the body or bodies of such person or persons only as he or they shall for the time being think proper to permit or suffer to be buried there, and for no other purpose whatsoever; and subject to the intent aforesaid in trust for the said (trustees and directors), their heirs and assigns for ever, as part of the property of the said company: And the said doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said (trustees and directors) their heirs

and assigns: And also (as a separate covenant with the said (chairman), his heirs and assigns), that he the said , his heirs and assigns, shall and will from time to time, and at all times hereafter, at his and their own costs and charges, as often as occasion shall require, well and sufficiently repair the grave, gravestone, mausoleum, or vault to be erected or made in or on the said plot of ground hereby released, or intended so to be, and observe, perform, and abide by all and singular the rules and orders which have been or shall from time to time hereafter be made by the said company for the management and regulation of the said cemetery, and the catacombs and vaults therein: Provided always, and it is hereby agreed and declared that in case the said , his heirs or assigns, shall at any time or times hereafter, without the consent of the said company, make any erection or erections other than a (mausoleum, gravestone, or vault (as the case may be)) on the said plot of ground or any part or parts thereof, or use or permit to be used the said plot of ground, or any part or parts thereof, or any erection or erections thereon otherwise than as a place of burial, or in case default shall be made in performance of all or any or either of the covenants or stipulations hereinbefore contained, then and in such case it shall be lawful for the said (trustees and directors) their heirs and assigns at any time thereafter into the said plot of ground, or any part thereof, in the name of the whole to re-enter and the same to have again, hold, possess, and enjoy as in their first or former estate: In witness, &c.

3. For the year 1869, 2333*l.* was received by the company as purchase-money for divers plots so disposed of and conveyed.

4. The company was rated as the occupier of the lands, buildings, catacombs, and vaults, and upon the principle that the company was liable to be rated for (inter alia) the receipts derived by them from the sale of the plots of ground so disposed of and conveyed, and the sum of 2333*l.* so received as purchase-money for the sale of the plots of land was treated by the respondents as part of the annual value of the occupation of the cemetery by the company in the year 1869.

5. The company are bound to keep in good order the plots of ground for the purchasers thereof, the doing of which entails upon the company various outlays which form part of its working expenses; a duty is moreover cast upon the company to keep in order in perpetuity all the ground of the cemetery not only during the period in which the company shall continue to realise a revenue from the burials taking place, and shall receive the sums of money from time to time as payments for the fee simple of the plots of land sold as aforesaid, but after they shall by selling and using the ground for burials have exhausted the land for the above purposes.

6. The gates of the cemetery are closed at half-past four

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o'clock P.M., and opened at seven o'clock A.M., during the winter months, and closed at six o'clock P.M., and opened at six o'clock A.M. during the summer months, and during the intervals, according to the regulations of the company, no admission is allowed even to a purchaser of a vault or catacomb.

7. The appellants contended that the company was entitled, in calculating the rateable value which a hypothetical tenant would give, to exclude the sums received for the purchase of the plots of ground sold and conveyed in fee simple during the year from the gross receipts of the company.

Horace Lloyd, Q.C., and *Castle*, for the respondents. The rate is assessed at a proper amount. *Reg.* v. *St. Mary Abbot's* (1) is directly in point. The company are the occupiers of the cemetery, and all that they have in effect granted by their conveyance is an exclusive right of burial. The occupier is the person to be rated, and the company cannot get rid of their liability on the ground that they have conveyed away the fee simple in the plots of ground; for otherwise the occupier of a house might get rid of his liability to be rated simply by granting away the legal estate.

Poland, for the appellants. First, the company are not occupiers. Secondly, the profits of the sale of the plots are not rateable. As to the first point, *Reg.* v. *St. Mary Abbot's* (1) is distinguishable. In that case the cemetery company granted only an easement pursuant to their Act of Parliament, here the land in fee is conveyed. The company are not in occupation, for the grantee has to keep the tomb in repair; he, therefore, is in occupation. The conveyance contains a power of re-entry upon the non-performance of conditions; this clearly contemplates that the purchaser shall be the occupier. With regard to the other point, the sum derived from the sale of the plots is not a part of the annual profits; the plots pass from the company for ever; and if they are to be assessed at all in respect of it, it ought to form a part of the annual profits estimated for several years: *Rex* v. *Mirfield* (2).

BLACKBURN, J. There is no doubt that judgment must be for the respondents. Two points have been urged on behalf of the

(1) 12 A. & E. 824. (2) 10 East, 219.

company; first, it is alleged that they are not in occupation of the plots of ground which have been sold. The real state of the case appears to be that the company have granted the legal estate upon certain trusts, and the purchasers have the use of the plots for the purpose of making graves subject to the company's regulations. The effect is that the legal estate is outstanding, for it is vested in the purchaser; but, nevertheless, by the terms of the grant, the company are in occupation of the plots of ground which they have sold. It makes no difference as to the liability to be rated that the legal interest is outstanding; and a cestui que trust, if he occupies, cannot escape the liability to be rated, on the ground that at law his trustee is entitled to the property; and it is of no consequence for the purposes of rating whether the occupier is legally or equitably entitled to the property.

The second point is, that the rateable value was wrongly assessed. We must ascertain how this quantum is to be arrived at. The Parochial Assessment Act has enacted that the basis for ascertaining the rateable value shall be the rent at which the property might reasonably be expected to let from year to year. It might be more equitable if the statute had provided that the basis should be the rent which a tenant for a term of years would pay for the property to be rated: but the legislature has decided otherwise, and has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate. The company, in 1869, received 2333*l.* for selling plots of ground, and it was argued on their behalf, that inasmuch as the ground sold would be unproductive to the company, perhaps for ever, it was not to be taken as part of their rateable property. But I think this argument fallacious: if it were pressed to its full extent the plots of ground would never be rateable, for they would not be part of the rateable property of the company in succeeding years. *Attorney General* v. *Earl of Sefton* (1) established that for the purposes of succession duty the value of property must be calculated at the time when the succession happens; and upon a similar principle the value of property for the purposes of rating must be estimated at the time when the rate is made. It follows, therefore, that the price of the plots of

(1) 11 H. L. C. 257; 34 L. J. (Ex.) 98.

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land which have been sold must be taken into account in ascertaining the rateable value; and I think that this was decided in *Reg.* v. *St. Mary Abbot's* (1); that case was determined many years ago, and does not appear to have been ever questioned. Mr. Poland argued that the value was to be spread over many years; that will be an alteration of the principle laid down in the Parochial Assessment Act, and is at variance with *Reg.* v. *Westbrook.* (2) A similar argument was unsuccessfully urged in that case. *Rex* v. *Mirfield* (3) is quite an exceptional case. No injustice will be done if the company are rated in every year according to the value which a hypothetical tenant would give for the occupation in the preceding year, and according to this rule the company's receipts in one year will govern the rateable value of the cemetery in the next.

QUAIN, J. I am of the same opinion. As to the first point, I think this case concluded by *Reg.* v. *St. Mary Abbot's.* (1) The company are in occupation of the plots of ground, and we have nothing to do with the question whether they are entitled at law or in equity. With regard to the other point, I think this case cannot be distinguished from *Reg.* v. *Westbrook.* (2) The principle of that case applies, and shews that the price of plots of ground sold in one year cannot be spread over several years for the purpose of ascertaining the rateable value.

ARCHIBALD, J. As to the question of occupation, I think the counsel for the company has failed to point out any difference between this case and *Reg.* v. *St. Mary Abbot's.* (1) As to the other point, I agree with the judgments of my Brothers Blackburn and Quain.

Judgment for the respondents.

Attorneys for appellants: *Heath & Parker.*
Attorney for respondents: *John Godwin.*

(1) 12 A. & E. 824. (2) 10 Q. B. 178.
(3) 10 East, 219.

HUGGINS, APPELLANT; WARD, RESPONDENT. 1873

June 6.

Contagious Diseases (Animals) Act, 1869 (32 & 33 *Vict.* c. 70), *ss.* 75, 81, 103—*Proof of Order of Privy Council—Proof that Owner of Diseased Animal did not give Notice to Police Constable—Documentary Evidence Act*, 1868 (31 & 32 *Vict.* c. 37), *s.* 2.

By s. 75 of the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), the Privy Council may from time to time make such orders as they think expedient for (inter alia) requiring notice of the appearance of any infectious or contagious disease among animals, and they may impose penalties. By s. 81 any order of the Privy Council shall be published in the *London Gazette*, and in a local newspaper, by any local authority to whom the order is sent. By s. 103, any person, acting in contravention of or guilty of an offence against the Act or any order of the Privy Council, is made liable to a penalty not exceeding 20*l.* and when such offence is committed with respect to more than four animals, a penalty not exceeding 5*l.* for each animal may be imposed.

By Order 19 of the Orders of Privy Council, made in December, 1871, every person, having in his possession an animal affected with a contagious or infectious disease, shall with all practicable speed give notice to a police constable.

On an information against the appellant, alleging that he had five sheep affected with a contagious disease and did not give notice to a constable, it was proved that the appellant had five sheep so affected:—

Held, first, that there was primâ facie evidence on which the appellant might be convicted of the offence charged, and it lay on him to shew if he could that he had given notice to a police constable.

Secondly, that whether publication of the order of the Privy Council was necessary to its validity or not, the production of a copy purporting to be printed by the Government printers was primâ facie evidence of the order under the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2.

Thirdly, that no penalty being imposed by the order, and the offence being with respect to more than four animals, the justices had power under s. 103, to inflict a penalty of 20*l.* or 5*l.* for each animal.

Semble, that publication was not necessary to the validity of the order.

CASE stated by Justices of Norfolk, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, charging that he on the 8th of August, 1872, at Shelfanger, &c., unlawfully was guilty of a certain offence against a certain order of Privy Council duly made and published on the 20th of December, 1871, under the Contagious Diseases (Animals) Act, 1869, and then in force in the said parish of Shelfanger, that is to say, that he had in his possession or in his charge fourteen animals,

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to wit, eight bullocks, three tups, and three lambs, affected with a contagious or infectious disease, and that he neglected with all practicable speed to give notice to a police constable of the fact of the animals being so affected, contrary to the order and statute.

At the hearing, the case against the appellant with reference to the eight bullocks was not proved to the satisfaction of the justices, but with reference to the three tups and three lambs the appellant was duly convicted of the said offence, and adjudged to pay a fine of 30*l.*, or 5*l.* per head.

Upon the hearing of the information, it was proved on the part of the respondent, and found as a fact, that the respondent was a superintendent of police for the division of Diss, in the said county. That a bill, of which the following is material, was posted up in Shelfanger:—

"Contagious Diseases (Animals). Important particulars in the Act of Parliament and orders of Privy Council relating thereto.

"Diseased Animals.

"1. The term contagious or infectious disease includes cattle plague, pleuro-pneumonia, foot and mouth disease, sheep-pox, sheep-scab, and glanders in horses.

"2. When any such contagious or infectious disease appears the owner or person in charge shall, as far as practicable, separate such affected animals from other animals not affected. In the case of cattle plague, pleuro-pneumonia, sheep-pox, and sheep-scab, this is imperative.

"3. On the appearance of any contagious disease as above, the owner or person in charge shall with all practical speed give notice of the same to a police constable . . . .

"Offences and penalties. Whoever shall act in contravention of any of the regulations specified above shall be liable to a penalty of 20*l.*, and in case of animals, a penalty of 5*l.* for each animal in lieu of the general penalty. . ."

The respondent put in evidence a copy of the order of Privy Council, dated the 20th of December, 1871, numbered (341), which purported to be printed by the Government printer, of which the following is material:—

"Order of Council, (341). At the Council Chamber, Whitehall,

the 20th day of December, 1871. By the Lords of Her Majesty's most Honourable Privy Council. Present, &c. . .

"Part II. Contagious or Infectious Diseases among Animals. Discovery and prevention of disease. 19. Every person having in his possession or under his charge an animal (including a horse) affected with a contagious or infectious disease shall observe the following:—(1.) He shall, as far as practicable, keep such animal separate from animals not so affected. (2.) He shall with all practicable speed give notice to a police constable of the fact of the animal being so affected. Such police officer shall forthwith give notice thereof to the inspector of the local authority, who shall forthwith report the same to the local authority, and (except in the case of foot and mouth disease) to the Privy Council."

The respondent also produced a printed copy of the *Norwich Mercury* newspaper, of the 11th of December, 1869, containing an advertisement as follows:—

"Contagious Diseases (Animals) Act, 1869. County of Norfolk. The local authority acting under the said Act has made the following regulations:—The local authority of the county of Norfolk gives power and authority to the police officers of the county constabulary, subject to such orders as may from time to time be given by the chief constable, to perform all such acts and observe all such things as may be necessary in the carrying out of the 32nd clause, and any other provision of the Contagious Diseases (Animals) Act, 1869, and orders of the Privy Council consequent thereon. Animals affected with pleuro-pneumonia shall only be moved for the purpose of immediate slaughter and to the nearest slaughter-house or other convenient place.

"Norwich, 4th December, 1869. "Charles R. Gilman,
"Deputy Clerk."

The justices received the same in evidence, and as proof of the fact stated in such advertisement.

It was further proved on the part of the respondent and found as a fact that on the 8th of August, 1872, the inspector for the Diss district under the Act went to the appellant's premises at Shelfanger, and there found eighty-one sheep, amongst which were

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three tups and three lambs which were suffering from foot-and-mouth disease, which was infectious. (1)

No publication of the order of the Privy Council in the *London Gazette* or in any local newspaper was proved.

No proof was given that the appellant had not given the required notice to a police constable.

It was contended on the part of the appellant, that there was no proof of the publication in the *London Gazette* of the said order of the Privy Council, dated the 20th of December, 1871. That there was no proof of the publication of the said order by the local authority in any local paper or otherwise. That the justices had no power to inflict any penalty, inasmuch as no penalty was fixed by the order of the 20th of December, 1871. That in the event of the justices having power to inflict a penalty it must not exceed 20*l.*, as the Privy Council could not have fixed a larger sum. That there was no proof that notice of the appearance of a contagious disease amongst the animals had not been given to a police constable as required by the order.

It was further contended on the part of the appellant that evidence of the posting of the bill was inadmissible as there was no proof that it came to the knowledge of the appellant, but the justices admitted such evidence.

It was further contended on the part of the appellant, that evidence of the advertisement in the *Norwich Mercury* was improperly admitted, it being of a date anterior to the order of Council, and it not being brought to the knowledge of the appellant; but the justices admitted such evidence.

The justices were of opinion that, by the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2, primâ facie evidence of any order issued before or after the passing of that Act by the Privy Council may be given in all courts of justice by the production of a copy of such order purporting to be printed by the government printer; that the Act 32 & 33 Vict. c. 70, s. 81, requires the publication in some newspaper circulating in the district

(1) There is no statement in the case that the appellant knew that the animals were diseased, but this was assumed by the Court to have been proved, and this assumption was not controverted by counsel: see the dictum of Quain, J., p. 526.

of the local authority of such orders only as are sent to the local authority by the Privy Council for publication, and that the order of Privy Council of the 20th of December, 1871, was not sent to the local authority for such publication, nor did it appear on the face of the order that it was the intention of the Privy Council that it should be so published. That with respect to any publication of the order either in the *London Gazette* or in a local newspaper (if the latter should be held to be necessary), it was not necessary for the purpose of establishing the justices' jurisdiction to give proof of such publication, as the Act does not say that the orders of the Privy Council shall be absolutely void if not so published; and it was held by Coleridge, J., that when the legislature requires a thing to be done not in itself essential to the validity of it, and does not in terms specify what shall be the consequence of non-compliance, the Court will not make that consequence to be an avoidance of the whole; and for a good reason: see *Le Feuvre* v. *Miller* (1); and further, the Act (s. 42) declares that any want of, or defect or irregularity in, publication shall not invalidate any order. The Act (s. 75) permits the Privy Council to impose penalties for offences against the orders not exceeding the sum of 20*l.* for any such offence, and so that in every such order provision be made that a penalty less than the maximum may be ordered to be paid. That every order shall have the like force and effect as if it had been enacted by this Act. Section 103 enacts, if any person is guilty of any offence against any order or regulation made by the Privy Council in pursuance of this Act, he shall for every such offence (except as otherwise provided in this Act), and except where a less penalty is provided in any such order or regulation, be liable to a penalty not exceeding 20*l.* Where any such offence is committed with respect to more than four animals a penalty not exceeding 5*l.* for each animal may be imposed instead of the penalty of 20*l.* The justices considered that in s. 75 the word "may" as to the imposition of penalties by the Privy Council was permissive and not imperative, and that the Privy Council not having thought fit to exercise the powers in this respect, the amount of the penalty was not otherwise provided in the Act, nor was a less penalty provided by the order, and therefore the case

(1) 8 E. & B. 321, 332; 26 L. J. (M. C.) 175, 178.

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came within the limits of s. 103. The order in Council, part II. s. 19, subs. 2, does not limit the parties to whom notice is to be given to the police constables of the county, therefore proof of notice not having been given is simply impossible; and if it were so limited, the fact that the Norfolk police force consists of 231 constables of different grades, dispersed throughout the length and breadth of the county, brought the justices to the conclusion that it was not necessary for the prosecutor to prove the negative, but the defendant might prove the affirmative in his defence if he would have the advantage of the same: see 11 & 12 Vict. c. 43, s. 14.

The questions of law are: 1. Whether the justices had power to inflict any penalty for the offence charged in the information; 2. Whether they had any power to inflict a greater penalty than 20*l.*; 3. Whether it was necessary there should have been proof that no notice was given to a police constable of the appearance of a contagious disease amongst the animals.

Merewether, for the appellant. The offence created by the orders of the Privy Council is the not giving notice to a police constable. No evidence whatever of this was given. No doubt it was not necessary to call all the police of the county; but the police constable stationed on the spot might have been called and negatived notice having been given to him. Without this, not even a primâ facie case was made out. In *Nicholls* v. *Hall* (1) this point was raised, but not decided.

[BLACKBURN, J. If he has given notice to a constable, the person accused can call the constable to shew it. There can be no doubt that there is no necessity to give affirmative evidence to prove the negative.

QUAIN, J. I would add that a primâ facie case was made out by shewing affirmatively that the appellant knew his cattle were diseased, so as to throw on him the onus of rebutting the charge.]

Secondly, the justices had no power to inflict any penalty, or a larger penalty than 20*l.* The orders mention no penalty.

[BLACKBURN, J. By s. 75 the Privy Council may name a penalty, or they can lower the penalty as fixed by the Act, but

(1) Since reported, Law Rep. 8 C. P. 322.

they are not obliged to do so; and by s. 103, when the offence is committed with respect to more than four animals—which this was—a penalty of 5*l.* for each animal may be imposed, instead of the 20*l.*]

Lastly, there was no proof of the making of the orders of the Privy Council or of publication in the *Gazette* or local papers; and the orders were of no force till duly published: see s. 81.

[BLACKBURN, J. By the Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2, subs. 2, the production of a copy of orders of the Privy Council, purporting to be printed by the government printer, is expressly made primâ facie evidence of the orders.]

But the orders are of no validity or effect till they have been published; and the production of a copy by the government printer is no proof of the publication.

[QUAIN, J. As to publication the Act must be taken to be only directory; there is nothing in it to say that the orders shall not be effective if not published.

BLACKBURN, J. There can be no doubt that the production of the copy was sufficient primâ facie evidence. I think publication would not be essential to their validity; but if the publication were essential, and they have not been published, the appellant might have rebutted the primâ facie evidence by shewing that the orders had not been published.]

The respondent did not appear.

PER CURIAM (Blackburn, Quain, and Archibald, JJ.):—

Judgment for the respondent.

Attorneys for appellant: *Doyle & Edwards, for J. C. Chittock, Norwich.*

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June 16.

THE QUEEN *v.* THE BOARD OF WORKS OF THE HACKNEY DISTRICT.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Liability of District Board to keep a new Street in Repair after having paved it.*

A board of works in a metropolitan district paved a new street (which had not been dedicated as a highway) under s. 105 of 18 & 19 Vict. c. 120, which enacts that the district board may pave any new street at the expense of the owners of the adjoining houses, and shall from time to time keep such pavement in repair. The street having afterwards become out of repair, the board refused to repair it, on the ground that a post and rails had been erected along the kerb of the footway by the owner of the estate. On motion for a mandamus to the board to repair :—

Held, that the board, having paved a new street, were bound afterwards to keep the pavement in repair, whether it had become a highway or not.

RULE calling on the Board of Works of the Hackney district to shew cause why a mandamus should not issue commanding them to put into repair the portion of Neville Road, Stoke Newington, which is in their district.

It appeared from the affidavits, that in December, 1871, the Board resolved that Neville Road, which was a new street, and had not been dedicated as a highway, should be paved at the expense of the owners (under 18 & 19 Vict. c. 120, s. 105 (1)), and in

(1) 18 & 19 Vict. c. 120, s. 105. "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board; . ."

Sect. 106. "The vestry or district board of any parish or district may, if they think fit, by notice in writing put up in any part of any street, in their parish or district, not being a highway, declare their intention of repairing the same under this Act, and thereupon the same shall be from time to time repaired by them under this Act;" with

January, 1872, the road was paved and the footpath flagged, and the expenses duly assessed on the owners of the houses adjoining the road. The road had since become out of repair, and on the occupier of one of the houses complaining, the board wrote that "they were quite willing to take upon themselves the repair and regulation of the road if it could be shewn that they were legally bound to do so under the circumstances, but considering the presence of the bar erected by the owner of the estate, they could not see, nor did they admit, any liability on their part so to do."

The bar alluded to was posts and rails about three feet high, running for a short distance parallel to the road, along the edge of the kerb of the footway.

McIntyre, Q.C., and *A. L. Smith*, shewed cause. First, there has been no sufficient demand and refusal on the part of the board to justify the application for a mandamus.

[BLACKBURN, J. They deny their liability, surely that is a refusal.]

Ex concessis, this road is not a highway; the board ought, therefore, under s. 106 of 18 & 19 Vict. c. 120, to have given notice of their intention to pave the road, and they not having done so, the road remains in the same position as before, and can only be repaired at the expense of the owners of the adjoining houses. This view is borne out by s. 80 of 25 & 26 Vict. c. 102, which enacts that a board or vestry, in order to pave a street not a highway, must give notice, and enables a majority of two-thirds of the owners and occupiers to prevent the board from interfering.

[BLACKBURN, J. I find no restriction in s. 105; any new street may be paved by the vestry.]

No doubt there is no restriction in s. 105; but s. 106 must be taken to control s. 105.

A. Wills, Q.C., and *G. Browne*, in support of the rule. Section 105 is very clear. If the vestry or board pave a new street, which they may do at the expense of the owners, they are afterwards

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a proviso which is repealed by s. 80 of 25 & 26 Vict. c. 102, by which section notice is to be served on the owners and rated occupiers of the houses in the street, and no street is to be repaired as in the section mentioned, if two-thirds of the owners or rated occupiers give notice of their objection.

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from time to time to keep the pavement in repair, and as nothing is said as to how the expense is to be defrayed, it must be out of the general rates. By 18 & 19 Vict. c. 120, s. 250, "street" includes any road, &c., whether a highway or not; and s. 112 of 25 & 26 Vict. c. 102, defines "new street" as any street hereafter to be laid out. Sect. 105 of the original Act is general in its terms applying to any new street, and it is therefore immaterial whether it be a highway or not. Sect. 106, on the contrary, applies to a street not a highway, that is, to an old street.

BLACKBURN, J. I am of opinion that the rule must be made absolute. In s. 105 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), there is no definition of "new street," but the legislature seem to think that they have given sufficient definition of the word "street" in the first Act, which (s. 250) is to include, amongst others, any road, square, or passage, whether a thoroughfare or not; and then by the second Act (25 & 26 Vict. c. 102, s. 112) "street" is to include the subject-matters in s. 250 of the first Act, and "new street" is to include any street hereafter to be made; so that a "new street" need not be a thoroughfare. And inasmuch as a landowner might lay out a street or square, without dedicating it to the public, and might leave it in a state foundrous and bad or even injurious to health, a power is given by s. 105, that if it is not properly paved the owners and occupiers of the houses forming the greater part of it may call upon the vestry to pave it, or the vestry may do it without being called upon, and the expenses of the paving are to be paid by the owners of the houses forming the street, and the vestry are "from time to time to keep such pavement in repair." The new Act has extended the meaning of the word "pave" (s. 112) to the formation of the roadway or footway; but the word "pavement" is not extended; and although the expenses of laying the pavement in the first instance are to be paid by the owners, it is not said how the vestry, who are from time to time to keep the pavement in repair, are to be reimbursed the expenses, and there is no provision that they shall be paid by any one in particular, consequently the expenses must fall, like other expenses, on the general rate.

It was said that laying down fresh stone would be paving and

not repairing, and must fall on the occupiers, but there is really nothing in that objection. Then it was said that s. 106 overrides s. 105; and that in order to make the board liable they must have proceeded under that section. But that is not so; s. 106 points to old streets that have not become highways by dedication before or since the Highway Act, or which it is not intended should become highways, as in some parts of the Bedford estate; and no doubt in such cases the board may repair them, but only after notice, and when two-thirds of the occupiers do not object, as required by s. 80 of the same Act. In s. 105, "not being highways" is left out, whether intentionally or not, it is not necessary to decide; and it is argued, that if a private street may be paved under s. 105, it is inconsistent with s. 106; but s. 105 only applies to new streets, so that it is not necessarily inconsistent. But even if it were inconsistent, s. 105 is perfectly clear that after the board have paved a new street they are from time to time to keep it in repair. An indictment might or might not lie, but it is no answer to a mandamus that one of the owners has put up a barrier, if the other owners have a right to have the street kept in repair after they have paid the original cost of paving.

QUAIN, J. I do not profess to understand this legislation; but I cannot see how the defendants can get over the words of s. 105. The owners are to pay for the repairs in the first instance, but after that they have a corresponding right to have the street kept in repair. One would naturally suppose that a private street so paved was ever after to be left open for the public if it is repaired by them. I do not say how this may be; but the words imposing the duty on the board are clear. They may be called upon to pave, or may, mero motu, pave a new street; and after that they are "from time to time to keep the pavement in repair."

Rule absolute.

Attorney for prosecution: *Houghton.*
Attorney for defendants: *R. Ellis.*

END OF TRINITY TERM, 1873.

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ADULTERATION OF FOOD—*continued.*

went to the shop of respondent and asked for "a pound of butter at 7*d.*," and the shopman handed to him a pound, the respondent being present; on being analysed, it was proved to have been largely adulterated with lard, tallow, &c., or material of that nature. The police magistrate was of opinion that it was necessary to prove that the butter when sold was represented as unadulterated, and that it was also necessary to prove that respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk, and he therefore dismissed the information. On appeal:—*Held*, that it was not necessary that any express representation that the article sold was unadulterated should be made at the time of sale of a simple article like butter; butter was asked for, and something handed over as butter, and that was selling "as unadulterated." Secondly, that s. 3, whatever might be its effect, was not intended to cut down s. 2; it was merely adding an additional offence. The case must therefore be remitted to the magistrate for rehearing. FITZPATRICK *v.* KELLY - - 337

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AIDER BY VERDICT—*continued.*
presentation of a bankruptcy petition against defendant, fraudulently to remove part of the property of defendant to the value of 10*l.*, that is to say [enumerating divers articles], defendant then being a trader and liable to become a bankrupt."—To this there was a plea of not guilty, and a verdict of guilty and judgment. Error was brought on the ground that there was no allegation that defendant was ever adjudged bankrupt:—*Held*, that the fact of defendant having been adjudged a bankrupt was not necessary to complete the offence of conspiracy; it was complete if the persons charged had agreed to remove the goods in contemplation of an adjudication being obtained; and that this, though not expressly alleged, must be taken after verdict to have been proved before the jury; and that the defect was therefore cured by verdict. Heymann *v.* The Queen - - - 102

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2. —— *Quarter Sessions—Rule of Practice, requiring Entry of Appeal Three Days before Sessions.*] A certificate for a licence having been refused at licensing sessions, all the preliminaries to an appeal to the next quarter sessions required by 9 Geo. 4, c. 61, s. 27, were duly observed; but at the sitting of the court the quarter sessions refused to allow the appeal to be entered on the ground that by a rule of the sessions an appeal must be entered and grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions; and the sessions made an order for 10*l.* costs to the respondents under 12 & 13 Vict. c. 45, s. 6, as on an appeal which had not been entered or prosecuted. This order having been brought up and a rule to quash it obtained:—*Held*, that the rule of sessions amounted to imposing an additional condition to the appeal which the statute had not imposed, and was more than a mere rule of practice which it was competent to the sessions to make; and that the order for costs must be quashed. The Queen *v.* Pawlett - - - - - 491

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BASTARDY—*Order of Maintenance—Mistake in Substance—Amendment—12 & 13 Vict. c. 45, s. 7.*] A woman was delivered of a bastard child on the 27th of May, 1870. On the 11th of August she applied for a summons against T. as the putative father, which, on coming on to be heard, was withdrawn. On the 11th of April, 1871, she applied for another summons, which was heard on the 25th of April, when an order was made adjudging T. to be the father of the child, and to pay to the mother 2*s.* 6*d.* per week, from the 11th of August, 1870, until the child should attain thirteen years. The order having been removed by certiorari:—*Held*, that as the adjudication was wrong in point of substance, the order could not be amended under 12 & 13 Vict. c. 45, s. 7. The Queen *v.* Tomlinson - - - - 12

2. —— *Order in Bastardy—Bastardy Laws Amendment Acts*, 1872 *and* 1873 (35 *&* 36 *Vict. c.* 65, *ss.* 2, 3, *and* 36 *Vict. c.* 9, *s.* 8.)—7 *&* 8 *Vict. c.* 101, *ss.* 2, 3.—*Child born before the* 10*th of August*, 1872.] A single woman made application on the 22nd of May, 1872, under 7 & 8 Vict. c. 101, ss. 2 and 3, for a summons in bastardy against J. K. The child was born on the 26th of July. The Bastardy Laws Amendment Act, 1872, passed on the 10th of August, which repealed ss. 2 and 3 of 7 & 8 Vict. c. 101, and itself applies only to a child born after the 10th of August. On the 3rd of September the summons was issued; on the 11th of September J. K. appeared to the summons, and an order was made adjudging him to be the putative father, and ordering him to pay *three shillings* a week for its maintenance from the birth till it should attain the age of thirteen years.—On the 24th of April, 1873, the Bastardy Laws Amendment Act, 1873, was passed, and by s. 8 all orders made before the passing of this Act upon the father of a bastard child born before the 10th of August, 1872, for any payment in respect of such child, which would have been valid if the Act of 1872 had not passed, shall be and shall be deemed to have been valid to all intents:—*Held*, that the above order must be quashed, for that it was not made valid by s. 8, as it was for *three shillings* a week, whereas 7 & 8 Vict. c. 101, s. 3, only authorized an order for 2*s.* 6*d.*, and the order would therefore not have been valid if the Act of 1872 had not passed. The Queen *v.* Kay 324

BASTARDY LAWS AMENDMENT ACT, 1872, ss. 2, 3 - - - - 324
See Bastardy. 2.

BASTARDY LAWS AMENDMENT ACT, 1873, s. 8
See Bastardy. 2. [324

BASTARDY ORDER—Defect in substance - 12
See Bastardy. 1.

BEERHOUSE—Licence - 146, 235, 400
See Licence to Alehouse. 1, 2, 3.

BILL OF EXCHANGE — Consideration — Debt barred by bankruptcy - - 1
See Debt barred by Bankruptcy.

BILL OF LADING—General average
See General Average. [88, Ex. Ch. 362

BILL OF SALE—Fixtures - - - 290
See Fixtures.

BILLS OF SALE ACT - - - - 290
See Fixtures.

BONÂ FIDE TRAVELLER—Sale of liquor 483
See Licence to Alehouse. 4.

BREACH OF CONTRACT—Rescission - 210
See Rescission of Contract.

BREAD—Sale otherwise than by weight - 365
See Sale of Bread.

BRITISH CUSTOM—Average adjustment
See General Average. [88, Ex. Ch. 362

BURDEN OF PROOF—Bonâ fide traveller - 483
See Licence to Alehouse. 4.

—— Notice - - - - - 521
See Contagious Diseases (Animals) Act, 1869.

BURIAL FEES—New parish - - Ex. Ch. 217
See New Parish.

CAB STAND—Railway company - - 65
See Wilful Trespass.

CALLS—Indemnity - - - - 458
See Indemnity against Calls.

CANAL—Escape of water - - **Ex. Ch. 42**
See Duty of Canal Owner.
CARRIER—Animals—Condition - - **186**
See Carrier of Animals.
—— Passengers - - - - **57**
See Carrier of Passengers.
—— Passengers - - - **Ex. Ch. 161**
See Evidence of Negligence.

CARRIER OF ANIMALS—*Railway Company—Negligence—Conditions as to Restiveness of Cattle—Principal and Agent—Agreement for interchange of Traffic.*] The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he booked her for S. by the defendants' railway. He signed a contract, under which it was agreed between him and the G. N. Co. that they should not be responsible for any loss or injury to cattle, in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, &c., should be established from all parts of one company and beyond its limits to all parts of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendants for the loss of the cow, the Court having power to draw inferences:—*Held*, first, that the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, shewed that the G. N. Co. became the agents of the defendants to make the contract for the carriage of the cow.—Secondly, that the condition in the contract did not relieve the defendants from liability for negligence on the part of their servants in delivering the cow.—Thirdly (by Blackburn and Lush, JJ.; Mellor, J., dissenting), that the inference to be drawn from the facts was that there was negligence on the part of the defendants' porter; and that they were, therefore, liable to the plaintiff for the loss of the cow. Gill *v.* The Manchester, Sheffield, and Lincolnshire Railway Company - - - - 186

CARRIER OF PASSENGERS—*Railway Company—Carrier of Passengers—Passenger travelling "at his own risk"—Wilful and gross Negligence.*] Declaration, that plaintiff was a passenger by defendants' railway, and they so negligently conducted themselves in the management of their railway that an engine and tender came into collision with the train in which plaintiff was travelling, and he was injured thereby. Plea, that defendants received plaintiff to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that plaintiff should travel at his own risk. Replication, that it was by reason of the gross and wilful negligence of defendants that the accident happened. On demurrer:—*Held*, that the replication was bad; for that, whatever "gross or wilful negligence" might mean, plaintiff, by the terms on the pass, had agreed that defendants should not be liable for the consequences of any accident happening in the course of the journey, for which they would otherwise have been liable. McCawley *v.* The Furness Railway Company - - - 57

—— Negligence - - - **Ex. Ch. 161**
See Evidence of Negligence.
CASES—*Barwick* v. *English Joint Stock Bank* (Law Rep. 2 Ex. 259) followed - - **244**
See Fraud of Agent. 2.
—— *Begbie* v. *Fenwick* (24 L. T. (N.S.) 58) followed - - - - **290**
See Fixtures.
—— *Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72) dissented from - - - - **290**
See Fixtures.
—— *Edwards* v. *Coombe* (Law Rep. 7 C. P. 519) followed - - - - **182**
See Composition.
—— *Griffin* v. *Coleman* (4 H. & N. 265; 28 L. J. (Ex.) 134) followed - - **61**
See County Court Appeal.
—— *Hartley* v. *Shemwell* (1 B. & S. 1; 30 L. J. (Q.B.) 223) discussed - - **18**
See Garnishee Order. 1.
—— *Hoare* v. *Rennie* (5 H. & N. 19) discussed
See Rescission of Contract. [14
—— *Re Hatton* (Law Rep. 7 Ch. 723) followed
See Composition. [182
—— *Reg.* v. *St. Mary Abbot's* (12 A. & E. 824) followed - - - - 515
See Occupation for Poor-rate. 2.
—— *Swire* v. *Leach* (18 C. B. (N.S.) 479) followed - - - - **77**
See Privilege from Distress.
CEMETERY—Rating - - - - 515
See Occupation for Poor-rate. 2.
CERTIFICATE OF TREASURER—Poor-law audit
See Poor-law Audit. [501
CERTIFICATE—Railway stock—Estoppel
See Estoppel by Conduct. [Ex. Ch. 420

CHAMPERTY—*Relationship to One of Parties—Interest in Suit.*] Declaration, that J. H., a brother of defendant and a cousin of plaintiff, had died, leaving large real and personal property; that defendant was heir-at-law of J. H., and one of his next of kin; that J. H. left a will whereby his real and personal property was left to persons other than plaintiff and defendant, and plaintiff believed that the will revoked a former will by which J. H. had bequeathed property to plaintiff; and that in consideration that plaintiff would take the necessary steps to contest the will and would advance money and obtain evidence for such purpose and instruct an attorney, defendant promised to share with plaintiff half the real and personal property which might come to defendant

CHAMPERTY—*continued.*
by reason of such proceedings:—*Held*, that the agreement amounted to champerty; and that the fact that the plaintiff was a relation of the defendant and had some collateral interest in the suit, did not prevent a contract, by which he was to receive half of what the defendant recovered, being champerty. Hutley *v.* Hutley - 112

CHARTERPARTY—Illegality—Mens rea - 202
See Illegality in Contract.

CHURCHWARDEN—Election—Nomination 69
See Election of Churchwarden.

—— Mandamus—Return - - - 69
See Election of Churchwarden.

COLLECTION OF WATER—Canal - Ex. Ch. 42
See Duty of Canal Owner.

COMMON LAW PROCEDURE ACT, 1854, s. 51 54
See Contempt in not answering Interrogatories.

—— ss. 60, 61 - - - - 18, 363
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COMMON PLEAS OF LANCASTER—Practice 54
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COMPANY—Seal—Promissory note - 374
See Negotiable Instrument.

—— Stock of married woman - - 299
See Married Women's Property Act, 1870.

COMPANIES ACT, 1862, s. 38 - - 458
See Indemnity against Calls.

COMPENSATION—Canal—Escape of water
See Duty of Canal Owner [Ex. Ch. 42

COMPOSITION—*Bankrupt—Composition under s. 126 of the Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71)—*Effect of Non-payment of the Composition—Jurisdiction of the Court.*] Where, by a resolution under s. 126 of the Bankruptcy Act, 1869, the creditors of a debtor agree to accept a composition payable by instalments, and the debtor makes default in payment of an instalment, a non-assenting creditor is entitled to maintain an action for the whole debt. So held on the authority of *Edwards* v. *Coombe* (Law Rep. 7 C. P. 519); *Re Hatton* (Law Rep. 7 Ch. Ap. 723) - - - - - - 182

CONDITION—Carriage of passengers - 57
See Carriage of Passengers.

—— Contract of carriage - - - 186
See Carrier of Animals.

CONSIDERATION—Contract—Debt barred by bankruptcy - - - - - 1
See Debt barred by Bankruptcy.

CONSPIRACY—Bankruptcy—Removal of goods
See Aider by Verdict. [102

CONSPIRACY TO REMOVE GOODS—Bankruptcy
See Aider by Verdict. [102

CONSTABLE, SPECIAL - - - 344
See Special Constable.

CONTAGIOUS DISEASES (ANIMALS) ACT, 1869 (32 & 33 *Vict. c.* 70), *ss.* 75, 81, 103—*Proof of Order of Privy Council—Proof that Owner of Diseased Animal did not give Notice to Police Constable—Documentary Evidence Act*, 1868 (31 & 32 *Vict. c.* 37), *s.* 2.] By s. 75 of the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), the Privy Council may from time to time make such orders as they think expedient for (inter alia) requiring notice of the appearance of any infectious or contagious disease among animals, and they may impose penalties. By s. 81 any order of the Privy Council shall be published in the *London Gazette*, and in a local newspaper, by any local authority to whom the order is sent. By s. 103, any person, acting in contravention of or guilty of an offence against the Act or any order of the Privy Council, is made liable to a penalty not exceeding 20*l.*; and when such offence is committed with respect to more than four animals, a penalty not exceeding 5*l.* for each animal may be imposed. By Order 19 of the Orders of Privy Council, made in December, 1871, every person, having in his possession an animal affected with a contagious or infectious disease, shall with all practicable speed give notice to a police constable. On an information against the appellant, alleging that he had five sheep affected with a contagious disease and did not give notice to a constable, it was proved that the appellant had five sheep so affected:—*Held*, first, that there was primâ facie evidence on which the appellant might be convicted of the offence charged, and it lay on him to shew if he could that he had given notice to a police constable. Secondly, that whether publication of the order of the Privy Council was necessary to its validity or not, the production of a copy purporting to be printed by the Government printers was primâ facie evidence of the order under the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2. Thirdly, that no penalty being imposed by the order, and the offence being with respect to more than four animals, the justices had power under s. 103, to inflict a penalty of 30*l.*, or 5*l.* for each animal. *Semble*, that publication was not necessary to the validity of the order. Huggins *v.* Ward - 521

—— - - - - - - 202
See Illegality in Contract.

—— s. 67 - - - - - 496
See Substitution of Plaintiff.

CONTEMPT IN NOT ANSWERING INTERROGATORIES—*Practice—Rule or Order—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 51—*Personal Service—Common Pleas of Lancaster*—32 & 33 *Vict. c.* 37, *ss.* 6, 7, 15.] In a cause in the Court of Common Pleas at Lancaster, an order was granted by the district prothonotary to administer interrogatories to the plaintiff to be answered within ten days. The order with the interrogatories was served on the plaintiff's attorneys; and an order for further time to answer obtained by them. The interrogatories not having been answered within the further time, a rule was obtained in the Court of Queen's Bench for an attachment against the plaintiff, on the ground that the plaintiff had by not answering the interrogatories been guilty of a contempt under the Common Law Procedure Act, 1854, ss. 51, 100, and that by force of 32 & 33 Vict. c. 37, ss. 6, 7, and 15, the proper mode of proceeding was by rule in any one of the superior courts. On cause being shewn, the Court held

CONTEMPT IN NOT ANSWERING INTERROGATORIES—*continued.*
the proceedings regular, and made the rule absolute. Coston *v.* Blackburn - - 54

CONTEMPT OF COURT—*Inferior Court of Record—County Court, Jurisdiction of, over Contempt committed out of Court*—9 & 10 *Vict. c.* 95, *ss.* 3, 113.] By 9 & 10 Vict. c. 95, s. 3, the county courts were established and were made courts of record. By s. 113 the judge is impowered to impose a fine not exceeding 5*l.*, or to imprison for a term not exceeding seven days, for any contempt committed in court. *Held*, that the jurisdiction of the judge of a county court was confined by s. 113 to contempts committed in court; and he had no power to proceed against a person for a contempt committed out of court. *Semble*, that inferior courts of record have only power over contempts in facie curiæ. The Queen *v.* Lefroy [134

—— Interrogatories - - - - 54
See Contempt in not answering Interrogatories.

CONTINGENT LIABILITY—Proof in Bankruptcy [458
See Indemnity against Calls.

CONTRACT—Agent—Foreign principal 313, 331
See Contract by Agent. 1, 2.

—— Breach—Rescission - - - 14
See Rescission of Contract.

—— Consideration — Debt barred by bankruptcy - - - - 1
See Debt barred by Bankruptcy.

—— Illegality—Champerty - - 112
See Champerty.

—— Illegality—Mens rea - - - 202
See Illegality in Contract.

—— Negotiable instrument - - - 374
See Negotiable Instrument.

CONTRACT BY AGENT—*Contract with Agent of Foreign Principal—Right of Principal to sue.*] The plaintiffs, a foreign company, entered into negotiations through S. & Co., London commission merchants, for the supply, by Mr. C. the defendant, of certain railway wheels and axles; and the defendant, in consequence, had an interview, on the 29th of January, at S. & Co.'s office, with S., one of the partners, and H., the managing director of the plaintiffs' company; and the defendant signed in a diary of S. the following entry: "Mr. C. offers to supply 150 sets of wheels and axles (describing them) at 31*l.* per set, to be delivered free on board at Hull during February and March. This offer to remain open until the 3rd of February." On the 3rd of February S. & Co. telegraphed and wrote, "We confirm the order for 150 sets of wheels and axles," repeating the terms of the offer. Some of the sets were delivered by the defendant, the invoices being made out to S. & Co., and they paid for them; but the delivery of most of the sets was after March, and the plaintiffs sued for a breach of the contract. At the trial it was objected that the contract was with S. & Co., and not with the plaintiffs. The judge left it to the jury to say whether the contract was with S. & Co. or with the plaintiffs. The jury found for the defendant:—*Held*, that

CONTRACT BY AGENT—*continued.*
the direction and verdict were right. Die Elbinger Actien-Gesellschaft *v.* Claye - 313

2. —— *Undisclosed Foreign Principal—Authority of English Merchant when buying goods on account of foreign Constituents—"Purchases" to be made "on joint Account" of English and Foreign Firms.*] The presumption (whether it be an inference of fact or a conclusion of law), that foreign constituents do not give the English commission merchant any authority to pledge their credit to those from whom the commission merchant buys on their account, applies to a case in which a foreign firm agrees that an English firm shall "purchase" and ship goods "on the joint account" of the two firms.—H. F. & Co. were merchants in London, and defendant was a partner in the firm of H. B. & Co., carrying on business at Rangoon. Goods were supplied by plaintiff to H. F. & Co. on their order given in consequence of an arrangement between the two firms, as disclosed in letters, that H. F. & Co. should "purchase" and send out goods "on the joint account" of the two firms, 2 per cent. to be charged on the invoice by the London firm, and 5 per cent. by the Rangoon firm, including guarantee. Plaintiff had no knowledge of defendant, or that the Rangoon firm were in any way interested in the transaction, until after the goods were supplied:—*Held*, that defendant was not, as an undisclosed principal, a party to the contract under which the goods were supplied by plaintiff: for that, on the true construction of the correspondence, the Rangoon firm did not give authority to the London firm to establish privity of contract and pledge their credit with the English suppliers of the goods. Hutton *v.* Bulloch - - 331

CONTRACT OF CARRIAGE — Animals — Condition - - - - 186
See Carrier of Animals.

—— Passenger—Condition - - - 57
See Carrier of Passengers.

CONTRIBUTION ORDER—Repair of Highways [308, 327
See Application of Tolls. 1, 2.

—— Valuation List - - - - 5
See Union Assessment Committee Act, 1862.

CONTRIBUTORY NEGLIGENCE—Evidence Ex. [Ch. 161
See Evidence of Negligence.

COPYHOLD—Devise—Admittance of termor Ex. [Ch. 388
See Devise of Copyholds.

CORPORATION—Election of town councillor 418
See Election of Town Councillor.

—— Seal—Promissory note - - 374
See Negotiable Instrument.

COSTS—Appeal—Deposit - - - 61
See County Court Appeal.

—— Inspection of documents - - 84
See Costs of Inspection.

——Security - - - - - 219
See Security for Costs.

—— Security—Deposit - - - 61
See County Court Appeal.

COSTS OF APPEAL—Security—Deposit - 61
See County Court Appeal.

COSTS OF INSPECTION—*Costs, Taxation of, between Party and Party—Expenses of Witness qualifying himself to give Evidence—Costs of Inspection of Defendant's Books by Accountant on behalf of Plaintiff.*] An action involving long accounts between plaintiff and defendant was referred; and it was ordered that plaintiff, by an accountant to be named by the arbitrator, should have inspection of, and take extracts from, defendant's books. An accountant was named, and he was engaged many days over the books, and afterwards gave evidence before the arbitrator. The award was made in plaintiff's favour, with the costs of the action, reference, and award. On taxation:—*Held*, that the case came within the ordinary rule; and that plaintiff was not entitled to the costs of the preliminary examination of the books by the accountant. NOLAN *v.* COPEMAN - - 84

"COSTS TO ABIDE THE EVENT"—*New Trial—Payment into Court.*] If a rule for a new trial contains the term "Costs to abide the event," the "event" whereon the costs will depend is the event of the fresh contest as to the particular ground of dispute in respect of which the Court granted the rule. JONES *v.* WILLIAMS - 280

COUNTY COURT—Appeal—Deposit - 61
See COUNTY COURT APPEAL.

—— Contempt - - - - 134
See CONTEMPT OF COURT.

COUNTY COURT APPEAL—13 & 14 *Vict. c.* 61, *ss.* 14, 16; 19 & 20 *Vict. c.* 108, *ss.* 70, 71—*Appeal—Deposit of Money in lieu of Security for Costs—Memorandum therewith—Acknowledgment of Registrar.*] 19 & 20 Vict. c. 108, s. 71, provides that a party required by the County Court Acts to give security "may, in lieu thereof, deposit with the registrar . . . . a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by such registrar . . . . and to be signed by such party, his attorney, or agent, setting forth the conditions on which such money is deposited, and the registrar shall give to the party paying a written acknowledgment of such payment. . . . ."—Such sum was deposited by an appellant in the county court, without any memorandum, but the registrar gave an acknowledgment, superscribed with the name of the cause, and expressed in the following terms: "I do hereby certify that the plaintiff has paid into my hands the sum of 10*l.*, to abide the event of the appeal in the above case." The judge having refused to settle and sign a case for the appeal, because no memorandum had been given by the appellant:—*Held*, that as the acknowledgment of the registrar embodied the conditions upon which the money was deposited, the requirements of the above section had been substantially complied with, and that, therefore, the case should be settled and signed by the judge.—*Griffin* v. *Coleman* (4 H. & N. 265; 28 L. J. Ex. 134) followed. WALTERS *v.* COGHLAN - - - 161

COUNTY COURT JURISDICTION—Contempt 134
See CONTEMPT OF COURT.

COUNTY COURT RULES—Rule 122 - 496
See SUBSTITUTION OF PLAINTIFF.

COUNTY COURTS ACT. 1856, s. 57 - 496
See SUBSTITUTION OF PLAINTIFF.

COURSE OF EMPLOYMENT—Fraud—Managing director - - - - 141
See FRAUD OF AGENT. 1.

—— Fraud of Agent - - - - 244
See FRAUD OF AGENT. 2.

COURT OF INQUIRY—Privilege Ex. Ch. 255
See PRIVILEGED COMMUNICATION.

COURT OF JUSTICE—Privilege - Ex. Ch. 255
See PRIVILEGED COMMUNICATION.

"CRIMES BY BANKRUPTS AGAINST BANKRUPTCY LAW" - - - 410
See EXTRADITION.

CRIMINAL PLEADING—Aider by verdict 102
See AIDER BY VERDICT.

CROSS INTERROGATORIES—*Evidence—Interrogatories and cross Interrogatories*—1 *Wm.* 4, *c.* 22, *s.* 4—*Questions tending to discredit Witness and deter him from answering.*] Where interrogatories are administered on a commission to be executed in a country out of the jurisdiction of an English court, the Court, in its discretion, will disallow such interrogatories as may deter a witness from giving evidence before the commission. —After a commission has been granted under 1 Wm. 4, c. 22, s. 4, the Court will, before its execution, disallow any cross interrogatories which in their discretion they may think improper. STOCKS *v.* ELLIS - - - - 454

CUSTOM OF TRADE—Negotiable instrument 374
See NEGOTIABLE INSTRUMENT.

DAMAGE TO CARGO - - 88, Ex. Ch. 362
See GENERAL AVERAGE.

DAMAGE TO PIER—Liability - - 10
See HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847.

DAMAGES—Remoteness—Fences - - 274
See DUTY TO FENCE.

DEBENTURE—Payable to bearer - - 374
See NEGOTIABLE INSTRUMENT.

DEBT—Rent-charge in fee - - - 368
See RENT-CHARGE.

DEBT BARRED BY BANKRUPTCY—*Bankrupt—Promise to pay Debt barred by Discharge in Bankruptcy—Bill of Exchange—Want of Consideration*—24 & 25 *Vict. c.* 134, *s.* 164—32 & 33 *Vict. c.* 83, *s.* 20.] By s. 164 of the Bankruptcy Act, 1861, a promise to pay a debt barred by the certificate of discharge is made void. By s. 20 of 32 & 33 Vict. c. 83, the whole of the Act is repealed; but the repeal is not to affect the past operation of any enactment repealed, or affect any right accrued or restriction imposed before the commencement of the Act by or under any such enactment.—A debtor and his creditors entered into a deed of composition while the Act of 1861 was in operation, which deed was to have the effect on his debts as if the debtor had been discharged in bankruptcy. After the repeal of the statute by the above section, the debtor gave a bill of exchange to one of his creditors, who was barred by the composition deed, for his old debt:—*Held*, that the operation of s. 164 upon this transaction was preserved by the saving clause in s. 20; and the bill was therefore void. RIMINI *v.* VAN PRAAGH - - - - - 1

DEBTORS ACT, 1869, ss. 4, 5, 29 - - 187
See Lord Mayor's Court.

DEDICATION—Highway - - - 96
See Way, Dedication of.

DEFAMATION—Privileged communication [Ex. Ch. 255
See Privileged Communication.

DEPOSIT—County Court appeal - - 61
See County Court Appeal.

DEPOSIT OF VALUATION LIST - - 5
See Union Assessment Committee Act, 1862.

DEVIATION—Highway - - - 96
See Way, Dedication of.

DEVISE OF COPYHOLDS—*Devise for a Term of Years with Remainder over—Right of Lord to compel Termor to be admitted.*] A copyholder in fee devised his estate to trustees for a term of years and, subject to the term, to A. in fee. A. was admitted and paid a full fine; the admittance on the roll recited the will, and stated that "the lord by his steward delivered to A. seisin of the lands by the rod to hold the same to him and his heirs and assigns for ever, according to the purport and effect of the will; and saving the rights of the lord and all other persons, the said A. was admitted tenant thereof in manner aforesaid. And he paid the fine and relief, but because the said A. is an infant the custody as well of his person as of the premises aforesaid is committed to the guardians of the infant." After the admittance of A. the lord made proclamations, and, the trustees refusing to be admitted, he seized quousque:—*Held*, affirming the decision of the Court of Queen's Bench, that, as by the form of the admission A. was admitted in præsenti and not merely to the remainder, the lord had both a tenant on the roll and a full fine, and therefore could not force the trustees to come in and be admitted. Everingham *v.* Ivatt - - - - 388

DISCOVERY OF DOCUMENTS—Inspection—Costs
See Costs of Inspection. [84

DISTRESS—Privilege - - - 77
See Privilege from Distress.

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See Occupation for Poor-rate. 1.

DOCUMENTARY EVIDENCE ACT, 1868 - 521
See Contagious Diseases (Animals) Act, 1869.

DUTY OF CANAL OWNER—*Canal Company—Rights and Liabilities as between Canal Company and Owners of subjacent Mines.*] The defendants' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed, who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months' notice to the defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them. —The canal having been constructed and used for many years, the plaintiff, who was owner of coal mines under the canal, gave defendants proper notice of his intention to work them; defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskilful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was, that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.—The plaintiff thereupon brought an action, charging the defendants, having brought water into the canal, so carelessly and improperly managed the canal and the water, that the water escaped and flooded plaintiff's mine.—On the above facts, the Court having power to draw inferences:—*Held*, affirming the judgment of the Queen's Bench, that an action of tort could not be maintained.—*Semble*, by Kelly, C.B., and Pigott, B., that the plaintiff was entitled to compensation under the Act. Dunn *v.* Birmingham Canal Navigation Co. - - Ex. Ch. 42

DUTY TO FENCE—*Prescriptive Obligation to maintain Fence—Nature of the Obligation—Consequential Damage.*] The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over

DUTY TO FENCE—*continued.*
the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by H., and died in consequence. The defendant had had no notice of the fence having been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close:—*Held*, that the evidence shewed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close; that the obligation was absolute to keep up a sufficient fence at all times, the act of God or vis major only excepted, without any notice of want of repair; that the damage was not too remote; and the defendant was therefore liable to the plaintiff for the loss of the cows. Lawrence *v.* Jenkins - 274

ELECTION—Churchwarden - - 69
See Election of Churchwarden.

—— Office—Irregularity - - - 210
See Quo Warranto.

ELECTION, MUNICIPAL—Town councillor 418
See Election of Town Councillor.

ELECTION OF CHURCHWARDEN—*Right of Perpetual Curate to nominate one—Mandamus—Return.*] A perpetual curate is the minister of a parish within the general custom, by which (in conformity with canon 89) the churchwardens are chosen by the joint consent of the minister and parishioners, and if they cannot agree, the minister chooses one and the parishioners the other. And a perpetual curate has therefore a right to take part in the election of churchwardens, in the absence of proof of any other custom.—To a mandamus directing the minister and churchwardens to call a vestry for the purpose of electing a churchwarden by the parishioners, in conformity with the above custom, the churchwardens returned that a vestry was duly held and the minister did not propose a person nor endeavour to obtain the consent of the parishioners to his election; and therefore the parishioners elected two churchwardens. To this the prosecutor pleaded, that the parishioners had before and still denied the right of the minister to choose churchwardens jointly with the parishioners; wherefore the minister, as he lawfully might, nominated his churchwardens without attempting to get the parishioners' consent. On demurrer:—*Held*, that the plea was good.—The churchwardens also returned to the above writ (which was tested some time before their year of office expired) that they were now, at the date of the return, out of office. On demurrer:—*Held*, that the prosecutor was, notwithstanding, entitled to judgment. The Queen *v.* Allen - - - - 69

ELECTION OF TOWN COUNCILLOR—*Municipal Corporation—Selection by Burgess of his Ward—5 & 6 Wm. 4, c. 76, s. 44.*] By 5 & 6 Wm. 4, c. 76, s. 44, "If a burgess be rated in respect of distinct premises in two or more wards he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one."—A burgess of a borough, divided into wards, was on the roll for two wards; at the election of town councillors he voted for H. in one ward, and immediately afterwards voted in the other ward:—*Held*, that the vote for H. was good: for that by voting in one ward the burgess had properly made his selection; and the fact of his voting afterwards in the other ward could not vitiate his previous vote. The Queen *v.* Harrald - 418

ENTRY OF APPEAL—Quarter sessions - 491
See Appeal to Quarter Sessions. 2.

ESTOPPEL — Railway company — Certificate of stock - - - Ex. Ch. 420
See Estoppel by Conduct.

—— Warehouse—Distress - - - 77
See Privilege from Distress.

ESTOPPEL BY CONDUCT—*Trustee of Stock for Railway Company—Possession of Certificate by him—Equitable Mortgage thereof in Breach of Trust—Subsequent Notice to Mortgagee—Right to Legal Transfer of the Stock—Registration—Mandamus.*] H., a banker, was a director of the defendants' railway company, and he and another director were the registered proprietors of certain shares in the company, which were held by them as trustees for the defendants. No certificates had been issued to them in respect of such shares. The co-director died. The shares were afterwards changed into stock, and H. having converted some of the stock to his own purposes, was called upon to replace it, and did so by purchasing stock to the same amount, and the defendants issued certificates to him representing the amount of the stock. It was customary to issue stock certificates to registered holders of all consolidated stock, and never the practice to notice on the face of such certificates that the registered proprietors were trustees. In 1866, R., believing H. to be absolute owner of the stock, lent money to him upon the deposit of the certificates as security, together with a written memorandum, by which H. agreed to execute and deliver upon request a valid mortgage and legal transfer of the stock. No notice of this transaction was given to the defendants. R. died, leaving his widow executrix. On the 12th of February, 1869, the defendants found out the fraud of H., and on the 13th of February, gave notice to the executrix that H. had been a trustee for them. On the 5th of May, at her request, H. executed a transfer of the stock to her. On the 20th of May, she delivered the deed of transfer and certificates to the company requiring them to register the transfer and her name as the proprietor of the stock; which they refused to do.—The Court of Queen's Bench having refused a peremptory writ of mandamus to compel the registration:—*Held*, (reversing the judgment), that the defendants, by issuing and allowing their trustee to possess certificates which im-

ESTOPPEL BY CONDUCT—*continued.*

ported that the holder had an indefeasible title to the stock, precluded themselves from setting up their right as cestuis que trust against the bonâ fide mortgagee without notice, who acted upon the certificates in advancing the loan; and the executrix was entitled to a peremptory mandamus. The Queen *v.* Shropshire Union Co. [Ex. Ch. 420

"EVENT" - - - - - 280
See Costs to abide the Event.

EVIDENCE—Commission—Disallowing interrogatories - - - - 454
See Cross Interrogatories.

—— Negligence—Carriage of animals - 186
See Carrier of Animals.

—— Negligence—Railway company Ex. Ch. 161
See Evidence of Negligence.

—— Privilege - - - Ex. Ch. 255
See Privileged Communication.

EVIDENCE OF NEGLIGENCE—*Railway Company—Negligence—Evidence of Defendants' Liability—Contributory Negligence—Nonsuit.*] In an action against the defendants for negligence it was proved that the plaintiff, being a passenger on defendants' railway, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The jury having found for the plaintiff, leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendants' liability:—*Held*, by the Queen's Bench and Exchequer Chamber, that there was evidence, and that the verdict ought to stand.—*Quære*, how far the question of contributory negligence is open in such cases.—*Adams* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 4 C. P. 739) questioned. Gee *v.* Metropolitan Ry. Co. - - - Ex. Ch. 161

—— Carriage of animals - - - 186
See Carrier of Animals.

EXEMPTION FROM RATES—*Sunday and Ragged Schools (Exemption from Rating) Act*, 1869 (32 & 33 *Vict. c.* 40), *s.* 1—"*May exempt*" *discretionary.*] Under 32 & 33 Vict. c. 40, s. 1,—which enacts that every authority having power to impose rates, "may exempt" a building used as a Sunday or ragged school from any rate,—the rating authority have a discretion whether they will or will not exempt such a building. Bell *v.* Crane - - - - - - 481

EXPENSES OF SPECIAL CONSTABLE - 344
See Special Constable.

EXTRADITION—*Extradition Act*, 1870 (33 & 34 *Vict. c.* 52) *ss.* 2, 6, 7, 14, 26, *and sch.* 1—"*Crimes by Bankrupts against Bankruptcy Law*"—*Procedure required by Treaty—Treaty with Belgium.*] In the schedule to the Extradition Act, 1870 (33 and 34 Vict. c. 52) extradition crimes are enumerated, accessories being nowhere mentioned; amongst others are "crimes by bankrupts against bankruptcy law":—*Held*, that this could not be extended to complicity, by a person not himself a

EXTRADITION—*continued.*

bankrupt, in a fraudulent bankruptcy.—*Semble*, that, under s. 14, depositions, duly authenticated, are admissible in proceedings under the Act, though not taken in the presence of the accused, nor on the particular charge.—*Semble*, that conditions, not required by the Act, but required by a treaty before initiating proceedings under the Act, cannot be taken into account in considering the validity of proceedings under the Act, if the magistrate in other respects had jurisdiction under the Act.—*Quære*, whether the statute extends to acts committed before the passing of the statute. In the Matter of Elise Counhaye - 410

EXTRADITION ACT, 1870 - - - 410
See Extradition.

FENCES—Prescription—Damages - - 274
See Duty to fence.

FINE—Copyhold—Admittance of termor Ex. Ch.
See Devise of Copyholds. [388

FIXTURES—*Mortgagor and Mortgagee—Registration under Bills of Sale Act* (17 & 18 *Vict. c.* 36.)] H., a lessee for years, demised by indenture of mortgage to the plaintiffs certain buildings used as an iron factory for the residue of the term, except the last two days, and by the same indenture he also assigned to the plaintiffs all the machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest:—*Held*, that the indenture, being an assignment of fixtures, was an assignment of personal chattels within the Bills of Sale Act, and required registration.—*Boyd* v. *Shorrock* (Law Rep. 5 Eq. 72) dissented from; *Begbie* v. *Fenwick* (24 Law Times (N.S.) 58) followed. Hawtry *v.* Butlin - - - - - - 290

FOOD—Adulteration - - - - 337
See Adulteration of Food.

FOOTPATH—Deviation - - - 96
See Way, Dedication of.

FOREIGN ATTACHMENT—Mayor's Court 107
See Lord Mayor's Court.

FOREIGN PRINCIPAL—Contract - 313, 331
See Contract by Agent. 1, 2.

FOREIGN SHIP—Admiralty jurisdiction 197
See Admiralty Jurisdiction.

FOREIGN SOVEREIGN—Ship—Jurisdiction 197
See Admiralty Jurisdiction.

FOREIGN STATE—Ship—Jurisdiction - 197
See Admiralty Jurisdiction.

FRAUD—Agent—Bank manager - - 244
See Fraud of Agent. 2.

—— Agent—Managing director - - 141
See Fraud of Agent.

FRAUD OF AGENT—*How far a Company is affected by Fraud of its Managing Director—Assignment of Debt—Appropriation of Debt to Payment of Bill.*] The plaintiffs, a limited company, of which C. was managing director, had begun printing a periodical for D. & Co., a firm consisting of the defendant's son and two others, and the periodical was being sold on commission by S. The plaintiffs, represented by C., refused to go on

FRAUD OF AGENT—*continued.*
printing without a guarantee, and the defendant consented to become security by drawing a bill on D. & Co. and indorsing it to the plaintiffs, upon the understanding that he was to have funds to meet it out of the debt accruing from S. to D. & Co. C. was told of this arrangement. Before the defendant drew this bill, C. had lent money to D. & Co. on his own account, and held their acceptance to his draft. When this latter bill became due, C. obtained an order on S. from the other two partners of D. & Co., without the knowledge or consent of the defendant or his son, and under this order C. obtained the amount due from S. to D. & Co. and appropriated it to the payment of this bill, the amount being more than sufficient to cover the defendant's bill. The plaintiffs having sued defendant on his bill:—*Held*, that the defendant had no defence as against the plaintiffs; for that the plaintiffs were not responsible for what C. did in getting his private debt paid, as, though he was their managing director, he was not then acting for them or in pursuance of any authority from them. McGowan and Company, Limited, *v.* Dyer - - - - - - - 141

2. —— *False Representation — Signature of Party to be charged—9 Geo. 4, c. 14, s. 6—Signature by Agent of Company formed under 7 Geo. 4. c. 46 — Action against Joint Tortfeasors.*] The plaintiff sued W. & G. jointly, for a false representation with respect to the solvency of R. The defendant W. was sued as the public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant, G., was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R. was responsible to the extent of 50,000*l.* The defendant, G., wrote a letter, which he signed as manager, giving a favourable reply as to R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:—*Held*, first, that the signature of G. as manager was the signature not merely of an agent, but of the defendants' banking company itself, and therefore the signature of the party to be charged within s. 6 of 9 Geo. 4, c. 14. s. 6, so as to make the banking company liable for his false representation.—Secondly, that the letters shewed that the communications were between the two banks; and the representation was not merely the representation of G. personally, but of the defendants' banking company.—Thirdly, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R.'s solvency might have been made on behalf of a customer of the S. bank, and that the representation might be communicated to him; and that the banking company and G. were liable to the plaintiff, he being the customer who had made the inquiry.—Fourthly, that, on the authority of *Barwick* v. *English Joint Stock Bank* (Law Rep. 2 Ex. 259), the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank.—Lastly, that, as all persons directly concerned in the commission of a fraud are to be treated as principals, the banking company and G. might be sued jointly. Swift *v.* Winterbotham, P. O., and Goddard - 244

"FRENCH OR FANCY BREAD" - - 355
See Sale of Bread.

FRIENDLY SOCIETY—Rules—Sickness - 295
See Sickness.

GARNISHEE ORDER—*Garnishee Clauses of Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125, *ss.* 60, 61)—"*Judgment Creditors*"—1 & 2 *Vict. c.* 110, *s.* 18—*Rule or Order of Superior Court.*] By s. 18 of 1 & 2 Vict. c. 110, all rules of courts of common law, whereby any sum of money or costs shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom such moneys or costs shall be payable shall be deemed judgment creditors within the meaning of the Act; and all remedies given by the Act to judgment creditors are given to such persons. By ss. 60, 61, of the Common Law Procedure Act, 1854, any creditor who has obtained a judgment in any superior court may have the debtor examined as to debts due to him; and such judgment creditor may obtain an order attaching the debts due from third persons (the garnishees) to the debtor:—*Held*, that a person who had obtained a rule in one of the superior courts, ordering the payment of costs, was not by force of s. 18 of 1 & 2 Vict. c. 110 a judgment creditor within the garnishment clauses of the Common Law Procedure Act, 1854.—*Hartley* v. *Shemwell* (1 B. & S. 1; 30 L. J. (Q.B.) 223) discussed. The Sunderland Local Marine Board *v.* Frankland; Oliver and Botterill, Garnishees 18

2. —— *Garnishee Clauses of Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 60 *and* 61—*Judgment Creditors— Order entered of Record*—1 & 2 *Wm.* 4, *c.* 58, *s.* 7.] A person who has obtained an order for the costs of an interpleader issue and entered it of record, pursuant to s. 7 of 1 & 2 Wm. 4, c. 58, so as to have the force and effect of a judgment, is not a judgment creditor within the meaning of the garnishee clauses (ss. 60 and 61) of the Common Law Procedure Act, 1854. Best *v.* Pembroke. E. & C. Curties, Garnishees - - - 363

GARNISHMENT—Judgment creditor - 18
See Garnishee Order. 1.

GENERAL AVERAGE—*Ship and Shipping—Loss to Cargo by Water let into Ship to extinguish Fire —Construction of Bill of Lading—"Average, if any, to be adjusted according to British Custom."*] Plaintiff shipped bark on board defendants' general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be

GENERAL AVERAGE—*continued.*
adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, and a hole was cut in the side of the ship, and her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship seriously damaged. The plaintiff's bark was destroyed by the water poured into the ship.—In an action for general average contribution in respect of the destruction of plaintiff's bark, it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:—*Held* (affirming the judgment of the Queen's Bench), that, whether or not the loss was, according to the general law of England, the subject of general average contribution, plaintiff, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract, and he was bound by it, even if different from British law. Stewart *v.* West India and Pacific Steamship Company [Ex. Ch. 362

GOODS IN WAREHOUSE—Distress - 77
See Privilege from Distress.

GUARDIAN — *Testamentary Guardian under* 12 *Car.* 2, *c.* 24, *s.* 8—*Right to Custody of Ward—Habeas Corpus—Discretion of Court—Validity of Appointment.*] A person, who has been duly appointed under 12 Car. 2, c. 24, s. 8, by the will of a father to be guardian of his child, stands in loco parentis, and having, therefore, a legal right to the custody of the infant, may, in order to obtain possession of such ward, claim a writ of habeas corpus, which a common law court has no discretion to refuse, if the applicant be a fit person and the child too young to choose for itself.—Where, however, the validity of the testamentary appointment is disputed, the Court will direct an issue to be tried by a jury in order to establish the same. In the Matter of Mary Ellen Andrews - - - - - 153

HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847 (10 *Vict. c.* 27), *s.* 74—*Liability of Owner of Vessel for Damage to Harbour, Piers, &c., however caused.*] Under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27), the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage, although the accident be the result of inevitable accident from stress of weather, without any default of those in charge. Dennis *v.* Tovell - - - - - 10

HIGHWAY—Dedication - - - 96
See Way, Dedication of.
—— Repair—Contribution order - - 327
See Application of Tolls. 1, 2.
—— Repair—New street - - - 528
See New Street.
—— Stopping up—Notice of vestry - 403
See Notice of Vestry.
—— Turnpike tolls - - - 308, 327
See Application of Tolls. 1, 2.

HUSBAND AND WIFE—Money received [Ex. Ch. 504
See Money received to Use of Husband and Wife.
—— Stock of wife - - - - 299
See Married Women's Property Act, 1870.

HYDE PARK—Regulations - - - 118
See Parks Regulation Act, 1872.

ILLEGALITY IN CONTRACT — *Charterparty—Contract—Illegality—Mens rea—The Contagious Diseases (Animals) Act*, 1869 (32 & 33 *Vict. c.* 7), *s.* 78—*Order in Council prohibiting the Landing of Hay.*] By a charterparty made by defendant's agent in France defendant chartered plaintiff's ship, and it was stipulated that the ship should load a cargo of pressed hay at T., in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. Defendant's agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an Order in Council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The Order had been made before the charterparty was entered into, but neither party knew of it. After some delay defendant received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the defendant to elapse beyond the lay-days. The plaintiff having brought an action for this detention of his ship, the defendant contended that the contract was for an illegal purpose, and therefore void:—*Held*, that, although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and defendant was therefore liable for the demurrage. Waugh *v.* Morris - - - 202
—— Champerty - - - - 112
See Champerty.

INCUMBENT OF NEW PARISH—Burial fees
See New Parish. [Ex. Ch. 217

INDEMNITY AGAINST CALLS — *Contract of Indemnity—Liability of Transferee of Shares in respect of Future Calls—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Proof of Debt—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 158—*Contingent Liability.*] The plaintiff, a holder of certain shares in a limited company, transferred them to the defendant, who transferred them to M. The company was ordered to be wound up, and a call of 40*l.* a share was made on the contributories in Class A, being the existing members, amongst whom M. was placed; these, including M., being unable to pay, the plaintiff and defendant were placed upon the list of contributories in Class B, as past members, under s. 38 of the Companies Act, 1862, and were ordered in March, 1869, to pay a call of 40*l.* per share. The de-

INDEMNITY AGAINST CALLS—*continued.*
fendant had executed a deed of inspectorship under s. 192 of the Bankruptcy Act, 1861, which was duly registered in December, 1867. The liquidators of the company proved for the amount of calls against the defendant's estate, but no part was paid; and the plaintiff, having paid a sum in compromise of the money remaining due on the shares, sued the defendant for the amount:—*Held*, that the defendant was liable to indemnify the plaintiff against calls made after the defendant had transferred his interest to M.; and that the claim of the plaintiff was not proveable under s. 153 of the Bankruptcy Act, 1861, and the defendant's deed therefore afforded no defence. KELLOCK *v.* ENTHOVEN - - 458

INDICTMENT—Defect—Aider by verdict - 102
See AIDER BY VERDICT.

INFANT—Guardian - - - - 153
See GUARDIAN.

INFERIOR COURT—Contempt - - 134
See CONTEMPT OF COURT.

INSANITY—Sickness - - - 295
See SICKNESS.

INSPECTION OF DOCUMENTS—Costs - 84
See COSTS OF INSPECTION.

INSOLVENT PLAINTIFF—Security for costs 209
See SECURITY FOR COSTS.

INSURANCE, MARINE—Slip - - 469
See SLIP OF POLICY.

INTEREST IN SUIT—Champerty - - 112
See CHAMPERTY.

INTERROGATORIES—Disallowance - 454
See CROSS INTERROGATORIES.

—— Not answering—Contempt - - 54
See CONTEMPT IN NOT ANSWERING INTERROGATORIES.

IRREGULARITY—Election - - - 210
See QUO WARRANTO.

JOINT TORT FEASORS—Action - - - 244
See FRAUD OF AGENT. 2.

JOINT-STOCK COMPANY — Stock of married woman - - - - 299
See MARRIED WOMEN'S PROPERTY ACT, 1870.

JUDICIAL PROCEEDING—Notice to person affected [344
See SPECIAL CONSTABLE.

—— Privilege - - - - Ex. Ch. 255
See PRIVILEGED COMMUNICATION.

JUDGMENT CREDITOR - - 18, 363
See GARNISHEE ORDER. 1, 2.

JURISDICTION—Admiralty—Foreign ship 197
See ADMIRALTY JURISDICTION.

—— County court—Contempt - - 134
See CONTEMPT OF COURT.

—— Justices—Warrant against overseer - 501
See POOR-LAW AUDIT.

—— Justices—Wilful trespass - - 65
See WILFUL TRESPASS.

JUSTICES—Appeal—Practice - 305, 491
See APPEAL TO QUARTER SESSIONS. 1, 2.

JUSTICES—*continued.*
—— Jurisdiction—Wilful trespass - - 65
See WILFUL TRESPASS.

—— Licence—Appeal - - - 146
See LICENCE TO ALEHOUSE. 1.

—— Licence—Discretion - - - 400
See LICENCE TO ALEHOUSE. 3.

JUSTICES' JURISDICTION—Warrant against overseer - - - - - 501
See POOR-LAW AUDIT.

"KNOWN OR DEFINED BOUNDARY" - 227
See PLACE HAVING A KNOWN OR DEFINED BOUNDARY.

"LAND"—*Metropolis Local Management Amendment Act*—(25 & 26 *Vict. c.* 102), *s.* 77—*Paving of New Street*—"*Land*" *liable*—*Railway.*] A railway in the metropolitan district was carried across a new street by an arch. On one side of the street the railway was carried forward on arches, and on that side was a strip of land, ten feet wide, left open for the purpose of repairing the arches; this abutted for ten feet on the street. On the other side the railway was carried forward on an embankment, and the sloping part or buttress of the embankment abutted on the street about thirty-six feet, and at the foot of the embankment was an open space, also about thirty-six feet wide, also abutting on the street, which was left for the purpose of allowing of slips in the embankment. The vestry of the parish, having determined to pave the street, sought to make the railway company contribute, under s. 77 of 25 & 26 Vict. c. 102, as owners of "land" abutting on the street:—*Held*, that the above pieces of land, including the slope of the embankment, were "land" within that section. HIGGINS *v.* HARDING - - 7

LANDLORD AND TENANT—Distress—Privilege [77
See PRIVILEGE FROM DISTRESS.

LANDS CLAUSES ACT, 1845, s. 127 - Ex. Ch. 26
See SUPERFLUOUS LANDS.

LIBEL—Privileged communication - Ex. Ch. 255
See PRIVILEGED COMMUNICATION.

LICENCE—Alehouse - 146, 235, 400, 483
See LICENCE TO ALEHOUSE. 1, 2, 3, 4.

—— Beerhouse - - - - 400
See LICENCE TO ALEHOUSE. 3.

LICENCE TO ALEHOUSE—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 8—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 75, *sch.* 2—*Appeal to Quarter Sessions*—9 *Geo.* 4, *c.* 61, *ss.* 27–29—*Mandamus.*] By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 8, "all the provisions (ss. 27–29) of 9 Geo. 4, c. 61, as to appeal (to quarter sessions) from any act of any justice, shall, as far as may be, have effect with respect to the grant of certificates under this Act." By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, and sch. 2, ss. 27–29 of 9 Geo. 4, c. 61, are repealed, "except in so far as the sections relate to the renewal or transfer of licences under ss. 4 and 14 of the same Act:"—*Held*, that, as s. 8 of 32 & 33 Vict. c. 27, was left wholly unrepealed, the appeal given under that section by reference to ss. 27–29 of 9 Geo. 4, c. 61, remained, notwithstanding the repeal of those sections.—Therefore, justices having refused a certificate for a licence

LICENCE TO ALEHOUSE—*continued.*
to sell beer, &c., not to be consumed on the premises, on other grounds than those prescribed by s. 8 of 32 & 33 Vict. c. 27, the Court refused a mandamus on the ground that the applicant might have appealed to quarter sessions. THE QUEEN *v.* SMITH - - - - - - - 146

2. —— 9 *Geo.* 4, *c.* 61—*Renewing Licence—Value of Premises—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 45, 46.] Sect. 45 of 35 & 36 Vict. c. 94, enacts that premises not licensed at the time of the passing of the Act under the Acts recited in the Wine and Beerhouse Act, 1869, shall not be subject to any provision now in force prescribing a certain value as a qualification. Sect. 46 enacts that if any premises licensed for the sale of intoxicating liquors at the passing of the Act are not of such annual value as authorizes the grant of a licence, the licence may be renewed upon the condition that the holder improves the premises so as to make them of sufficient annual value:—*Held*, that s. 46 did not apply to alehouses already licensed under 9 Geo. 4, c. 61, as they must be taken to have been exempted by s. 45 from the provisions in force as to value. THE QUEEN *v.* MANN - - - - 235

3. —— *Beerhouse "licensed on the 1st of May*, 1869"—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 19, *Construction of.*] Where a licence or certificate of a house licensed on the 1st of May, 1869, has afterwards dropped or been refused, the justices, on the true construction of s. 19 of 32 & 33 Vict. c. 27, have the same discretion to refuse a fresh certificate for a licence to sell beer to be consumed on the premises as if the application were in respect of a house which had not been licensed on the 1st of May, 1869, and the repeal of the declaratory section (3) of 34 & 35 Vict. c. 88, is immaterial. THE QUEEN *v.* CURZON - - - - - - 400

4. —— *Intoxicating Liquors, Sale of, during prohibited Hours—"Licensing Act*, 1872" (35 & 36 *Vict. c.* 94), *ss.* 24, 51, *subs.* 4—*Onus of Proof of Exception or Excuse on Defendant—Bonâ fide Belief.*] By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 24, premises in which intoxicating liquors are sold are to be closed during certain hours; and "any person who sells or exposes for sale, or opens or keeps open premises for the sale of intoxicating liquors during the time that such premises are directed to be closed, in pursuance of this section," is made liable to certain penalties; and in a subsequent clause it is enacted, that "none of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to bonâ fide travellers or persons lodging in his house." By s. 51, subs. 4, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant:"—The keeper of licensed premises having been charged with opening his premises for the sale of intoxicating liquors during prohibited hours, and

LICENCE TO ALEHOUSE—*continued.*
persons having been shewn to have been supplied with liquor on his premises during such hours:—*Held*, that the onus of shewing that the persons came within the exception lay on the defendant.—*Quære*, whether proof on the defendant's part of a bonâ fide though mistaken belief that the persons were travellers would have been sufficient. ROBERTS *v.* HUMPHREYS - - - 483

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See SUBSTITUTION OF PLAINTIFF.

LOCAL GOVERNMENT ACT, 1858, s. 12 - 227
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LORD MAYOR'S COURT—*Foreign Attachment, Surrender on—Detention after Final Judgment—Discharge from Custody—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5, 29.] A plaintiff in the Mayor's Court, London, had sued the defendant by process of foreign attachment. In order to dissolve the attachment the defendant surrendered himself into custody, and remained in prison until the plaintiff obtained final judgment. On a habeas corpus to discharge the defendant from custody:—*Held*, that the process of foreign attachment authorized the detention of the debtor only until final judgment; that the Debtors Act, 1869, s. 29, preserving the custom, did not extend its operation, and did not render lawful the detention of the debtor after judgment; and that the defendant was entitled to be discharged under s. 4. IN THE MATTER OF WILKINS - - - - 107

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—— Stock in company - - - 299
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MARRIED WOMEN'S PROPERTY ACT, 1870 (33 & 34 *Vict. c.* 93), *s.* 4—*Joint Stock or Incorporated Company, Duty of, to register Stock in Name of Married Woman.*] Under s. 4 of the Married Women's Property Act, 1870, on application by a married woman to a joint-stock or incorporated company to register stock in her name as a "married woman entitled to her separate use," the company must investigate the title; and if they refuse to register, the Court, unless a flaw in the title be shewn, will compel them by mandamus to register. THE QUEEN *v.* CARNATIC RAILWAY CO. - - - - - 299

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MEDICAL PRACTITIONER—*Medical Act*, 1858 (21 & 22 *Vict. c.* 90), *ss.* 31, 32—*Apothecaries Act* (55 *Geo.* 3, *c.* 194), *s.* 21—*Right of Practitioner registered as a Member of the College of Surgeons to sue for Medicines supplied.*] Section 21 of the Apothecaries Act (55 Geo. 3, c. 194), is not repealed; and the effect of that section, coupled with ss. 31 and 32 of the Medical Act, 1858 (21 & 22 Vict. c. 90), is, that a medical practitioner, registered under the latter Act, but only as a member of the College of Surgeons, and holding no other qualification, cannot recover for attendance and medicines supplied, except in a surgical case. Leman *v.* Fletcher - 319
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MONEY HAD AND RECEIVED—Husband and wife - - - - Ex. Ch. 504
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MONEY RECEIVED TO USE OF HUSBAND AND WIFE—*Parties to Action—Husband and Wife—Money borrowed for Wife's separate Use.*] A married woman had freehold and leasehold property devised to her separate use, and she being desirous of building and repairing some cottages upon part of it, and her husband wanting to pay off a debt, it was arranged, under the advice of the defendant, their solicitor, that a loan of 550*l.* should be raised by the mortgage of the wife's property, and the deposit of two policies of the husband of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by instalments, and a joint authority, signed by husband and wife, was
MONEY RECEIVED TO USE OF HUSBAND AND WIFE—*continued.*
given to the defendant to receive the first instalment from the mortgagees. He received it and paid the husband's debt, but he claimed to retain the balance for a debt due to him from the husband. An action was then brought by the husband and wife for the balance:—*Held*, affirming the judgment of the Court of Queen's Bench, that, on the facts, the joint action could be maintained. Jones *v.* Cuthbertson - - Ex. Ch. 504
MORTGAGE—Fixtures—Bill of sale - 290
See Fixtures.
MORTGAGE OF STOCK—Trust—Estoppel
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NEGLIGENCE—Carriage of animals - 186
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—— Railway company - - Ex. Ch. 161
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NEGOTIABLE INSTRUMENT—*Debenture payable to Bearer—Promissory Note—Custom.*] In May, 1869, the defendants, a limited company registered under the Act of 1862, sold to M. a document under the seal of the company and signed by two directors and the secretary. It was numbered and headed with the name of the company, and called "Debenture," and proceeded, "The company hereby promise, subject to the conditions indorsed on this debenture, to pay to the bearer 100*l.* on the 1st of May, 1872, or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions, and interest at 8 per cent. on the 1st of November and the 1st of May in each year; and also a further sum of 10*l.* by way of interest or bonus at the same time as the principal sum is paid off. In witness whereof the common seal of the company has been affixed this 9th of May, 1869." By the conditions indorsed a certain number of the bonds were to be drawn for twenty-one days before the days for the payment of the half-yearly interest, and any bond drawn was to be advertised and paid off with the interest and bonus due, the bond being given up and no further interest being payable.—In July, 1869, the bond was stolen from M. In October, 1871, the number of the bond was drawn. At the end of 1871 the plaintiff purchased the debenture from S., who had since absconded. The defendants, having notice of the robbery, refused to pay the debenture to the plaintiff, and he brought an action in his own name, alleging that he was lawful bearer of the debenture.—At the trial it was admitted that similar documents had been treated as negotiable; it was also admitted that the plaintiff derived title from the thief; but the jury found that the plaintiff had given value for the debenture without notice:—*Held*, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instruments, contrary to the general law; and that the custom to treat them as negotiable, being of recent origin

NEGOTIABLE INSTRUMENT—*continued.*
and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law. And the plaintiff, therefore, could not recover.—*Quære*, whether an instrument under the seal of a corporation can be a promissory note. Crouch *v.* Credit Foncier of England - 374

"NEW PARISH"—*Burial Fees—Right of Incumbent of "New Parish"*—58 *Geo.* 3, *c.* 45; 59 *Geo.* 3, *c.* 134—19 & 20 *Vict. c.* 104, *s.* 14; 20 & 21 *Vict. c.* 81, *s.* 5.] In 1851, the church of St. T. was built and consecrated, and in 1852 a district was assigned to it by Order in Council (as a chapel of ease) under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, s. 16, out of the ancient parish of W. At that time the deceased inhabitants were all buried in the parish churchyard. By the Act of Consecration and Order in Council authority was given to perform baptisms, marriages, and burials in the new church, and the fees were to be received by the incumbent of the district.—In 1854, the plaintiff was appointed incumbent of St. T.; and a burial ground was then provided for the whole parish, including St. T.'s district, which contributed to the rates out of which the ground was provided; and in 1856, the ground and a chapel on it were consecrated, and a burial board appointed, the old churchyard being closed. At that time G. was rector of the parish of W. In 1864 G. resigned, and B. was appointed rector. The plaintiff then claimed the right to perform the burial service over such of the parishioners of St. T. as were buried in the burial-ground, and to have the fees:—*Held* (affirming the judgment of the Queen's Bench), that the district of St. T. became a distinct and new parish in 1856 under s. 14 of Lord Blandford's Act (19 & 20 Vict. c. 104), and was a "new parish" within s. 5 of 20 & 21 Vict. c. 81; and that the plaintiff, as incumbent of the district, was entitled to the right he claimed, under the above sections of the two Acts, on the resignation of G. the incumbent of the old parish. Cronshaw *v.* Wigan Burial Board - - - - Ex. Ch. 217

NEW STREET—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Liability of District Board to keep a new Street in Repair after having paved it.*] A board of works in a metropolitan district paved a new street (which had not been dedicated as a highway) under s. 105 of 18 & 19 Vict. c. 120, which enacts that the district board may pave any new street at the expense of the owners of the adjoining houses, and shall from time to time keep such pavement in repair. The street having afterwards become out of repair, the board refused to repair it, on the ground that a post and rails had been erected along the kerb of the footway by the owner of the estate. On motion for a mandamus to the board to repair:—*Held*, that the board, having paved a new street, were bound afterwards to keep the pavement in repair, whether it had become a highway or not. The Queen *v.* Board of Works of the Hackney District - - - 528

—— Paving—"Land" - - - 7
See Land.

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See Contagious Diseases (Animals) Act, 1869.

—— Judicial proceeding - - - 344
See Special Constable.

—— Want of repair—Fences - - 274
See Duty to fence.

NOTICE OF APPEAL—Signature - - 305
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NOTICE OF VESTRY—*Highway, Stopping up*—5 & 6 *Wm.* 4, *c.* 50, *ss.* 84, 85—*"Special Purpose"*—58 *Geo.* 3, *c.* 69, *s.* 1.] J. P. having taken legal proceedings against the surveyor of the highway district to compel the repair of a highway in the hamlet of T. called "Blaenau Bach Road," a notice was issued by the overseer of the hamlet that "a meeting of the ratepayers of the hamlet of T. would be held, for the purpose of taking into consideration the proceedings now taken by Mr. J. P. against the surveyor of the highway district respecting Blaenau Bach Road, and for other purposes connected with the highways of the hamlet." At the vestry meeting so convened it was resolved, that the road should be stopped up under the provisions of 5 & 6 Wm. 4, c. 50; and proceedings were accordingly taken, and a certificate of two justices obtained, for the purpose; and the certificate, &c., were confirmed and enrolled at quarter sessions. A rule was afterwards obtained to quash the order of quarter sessions and certificate on the ground that the notice announcing the meeting did not specify the "special purpose" for which the meeting was held, as required by 58 Geo. 3, c. 69, s. 1:—*Held*, that the notice was sufficient.—The Queen *v.* Evan Powell. - - - - - 403

NOTICE OF WANT OF REPAIR—Fences - 274
See Duty to fence.

OCCUPATION FOR POOR-RATE—*Rating of Docks and Warehouses, &c., connected therewith.*] The appellants were the owners and occupiers of docks, and of warehouses, workshops, sheds, &c., connected with their docks, and were rated to the poor-rate separately for each, Nos. 1—8 being the warehouses, &c., No. 9 the docks. They were compelled by their Act of Parliament to keep up the docks, and the working expenses, &c., of the subject of the rate, taken as a whole, necessary to maintain the property in a condition to produce the income derived from it, exceeded the income, the chief expense being the keeping up the docks and basin No. 9. The premises in the other eight items were each capable of separate beneficial occupation apart from their connection with the docks; but each was enhanced in value by reason of its proximity to and connection with the docks:—*Held*, that the separate rating of items 1—8 was right; for that, as each subject was capable of beneficial occupation, it was therefore rateable, notwithstanding its connection with the docks, which, as a whole, produced no profit; and that they ought to be rated at the enhanced value, which was what a tenant from year to year would be expected to give for them. Mersey Docks and Harbour Board *v.* Overseers of Birkenhead - - - - - - 445

2. —— *Cemetery, Occupation of—Principle on*

OCCUPATION FOR POOR-RATE—*continued.*

which to be rated.] The appellants were a company that purchased lands and laid them out as a cemetery. They received fees for interments and conveyed plots of ground to be used as graves. In one year 2333*l.* was received by the company as purchase-money for such plots of ground. Each plot was conveyed by indenture purporting to grant it in fee simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the company, and, subject to such trusts, in trust for the company as part of their property. The defendants were rated as the occupiers of the lands, and upon the principle that the sum of 2333*l.* was to be treated as part of the annual value of the occupation of the lands by the appellants in that year:—*Held*, on the authority of *Reg.* v. *St. Mary Abbot's* (12 A. & E. 824), that the defendants were in occupation of the plots of ground which had been sold; and that the principle upon which they were rated was correct. The Queen *v.* Abney Park Cemetery Company [515

OFFICE—Election—Quo warranto - - 210
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ONUS OF PROOF—Bonâ fide traveller - 483
See Licence to Alehouse. 4.

ORDER OF MAINTENANCE - 12, 324
See Bastardy. 1, 2.

OVERSEER—Warrant for payment of money.
See Poor Law Auditors. [501

PARKS REGULATION ACT, 1872—(35 & 36 *Vict.* c. 15), *ss.* 4, 9, 11, *sch.* 1, *Regulations* 8, 19, 20—*Rules enforceable before laid before Parliament.*] By the Parks Regulations Act, 1872 (35 & 36 Vict. c. 15), s. 4, any person who does an act in contravention of any regulations in sch. 1, shall, on conviction, be liable to a penalty; but the regulations shall not take effect till one month after the passing of the Act. By regulation 8, no person shall deliver any public address in a park except in accordance with the rules of the park, which, by regulations 19 and 20, are rules made by the ranger or commissioners of works, and issued under the seal of the commissioners. By s. 9, any rule made in pursuance of sch. 1 shall be forthwith laid before the Houses of Parliament, if sitting, or if not, within three weeks after the beginning of the next session; and if any of such rules shall be disapproved of by either House within a month after the same has been laid before Parliament, such rules or parts of rules as shall be disapproved of shall not be enforced. The Act passed on the 27th of June, 1872. Rules for Hyde Park were made and published on the 30th of September. Parliament being then not sitting, and in November the appellant was convicted of delivering an address in the park not in accordance with one of the rules:—*Held*, that by s. 4 the regulations, together with the rules, if made, took effect one month after the passing of the Act, and could at once be confirmed; and s. 9 imposed a condition subsequent, by which any rule disapproved of by either House of Parliament was not to be enforced after such disapproval.—*Held*, also, that there was no right in the public to hold meetings in the royal parks, and therefore there was no right interfered with within s. 11; and

PARKS REGULATION ACT, 1872—*continued.*

that the conviction was therefore right. Bailey *v.* Williamson - - - - - 118

PARTIES TO ACTION—Amendment - 496
See Substitution of Plaintiff.

—— Husband and wife - - - Ex. Ch. 504
See Money received to Use of Husband and Wife.

PARTY TO BE CHARGED—Signature - 244
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PARTNERSHIP—Railway company—Carriage
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PASSENGER—Carriage—Condition - 57
See Carrier of Passengers.

PAVING—New street - - - 528
See New Street.

PAVING RATE—Railway—Land - - 7
See Land.

PEDLAR—*Pedlars Act*, 1871 (34 & 35 *Vict.* c. 96), *ss.* 3, 4—"*Pedlar.*"] Twelve ladies, of whom respondent was one, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house, for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes:—*Held*, that the respondent did not come within the definition of a "pedlar" in s. 3 of the Pedlars Act, 1871, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate. Gregg *v.* Smith - - - 302

PEDLARS ACT, 1871, ss. 3, 4 - - 302
See Pedlar.

PERPETUAL CURATE—Nomination of churchwarden - - - - 69
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PIER, DAMAGE TO—Liability - - 10
See Harbours, Docks, and Piers Clauses Act, 1847.

"PLACE" - - - - - 227
See Place having a known or defined Boundary.

"PLACE HAVING A KNOWN OR DEFINED BOUNDARY"—*Local Government Act*, 1858 (21 & 22 *Vict.* c. 98), *s.* 12—*Adoption of the Act.*] To entitle a district to adopt the Local Government Act, 1858 (21 & 22 Vict. c. 98), as being "a place having a known or defined boundary" within the meaning of s. 12, it is not necessary that it should be a legal district having a legal boundary of the whole inclosed area; it is sufficient if the place has an actual known and defined boundary, or one that is physical, visible, and notorious, so that there may be no mistake as to the limits within which the Act is to apply.—Certain small portions of the township of R. lay within and were surrounded on all sides by the adjoining township of G.:—*Held*, that the township of G., together with these small portions of the township of R. inclosed within it, constituted a "place having a known or defined boundary." The Queen *v.* The Local Government Board - - - - 227

PLEADING—Aider by verdict - - 102
See Aider by Verdict.

POLICY—Ship—Insurance - - - 469
See Slip of Policy.

POOR LAW—Audit of accounts - - 501
See Poor-law Audit.

—— Rate—Valuation list - - - 5
See Union Assessment Committee Act, 1862.

—— Rating of cemetery - - - 515
See Occupation for Poor-rate. 2.

—— Rating of docks - - - - 445
See Occupation for Poor-rate. 1.

POOR-LAW AUDIT—11 & 12 *Vict. c.* 91, *s.* 9—*Enforcing Payment against defaulting Overseer—Certificate of Treasurer not conclusive Evidence of Nonpayment.*] A Poor-law audit of parish accounts up to the 29th of September was held in the ensuing January, and 139*l.* was certified by the auditor as due from the overseer. A warrant of distress was then applied for under 11 & 12 Vict. c. 91, s. 9, to enforce the payment; and at the hearing of the information a certificate of the treasurer of the union was produced, which, by that section, is sufficient proof that the money had not been paid within seven days after it had been certified, nor within three days of laying the information. The overseer proved that he paid 84*l.* to the treasurer in October on account of the 139*l.*; and the justices refused to issue their warrant for more than the balance:—*Held*, that the justices were right: for that the certificate of the treasurer was only primâ facie evidence of the nonpayment, and it was open to the person surcharged to shew what he had paid, if he could do so without contradicting the auditor's certificate. The Queen *v.* Fordham - - 501

POOR RATE—Cemetery - - - 518
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—— Docks and warehouses - - - 445
See Occupation for Poor-rate. 1.

—— Valuation list - - - - 5
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PRACTICE—Action brought without authority 398
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—— Costs to abide the event - - 280
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—— Interrogatories—Contempt - - 54
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—— Interrogatories—Disallowing - - 454
See Cross Interrogatories.

—— Security for costs - - - 209
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PRESCRIPTION—Duty to fence - - 274
See Duty to fence.

PRINCIPAL AND AGENT—Contract—Foreign principal - - - 313, 331
See Contract by Agent. 1, 2.

—— Fraud—Bank manager - - 244
See Fraud of Agent. 2.

PRINCIPAL AND AGENT—*continued.*
—— Fraud—Managing directors - - 141
See Fraud of Agent. 1.

—— Tort - - - - - - 36
See Tortious Act of Servant.

PRIVILEGE FROM DISTRESS—*Landlord and Tenant—Distress for Rent—Goods deposited at a Depository Warehouse to be taken care of—Estoppel.*] The plaintiff deposited household furniture at a depository to be warehoused at the rate of 30*s.* a year. At the time he thought he was depositing them with a company with whom he had had dealings before; and he received a receipt in the name of the company, which name was also over the door of the depository. The fact was that the company had sold their business to B., and let the premises to him, but they had authorized the use of their name. B. being in arrears for rent, the defendants seized and sold the plaintiff's goods under a warrant of distress from two of the directors of the company; on which plaintiff brought an action against defendants:—*Held*, that the case fell within the principle of *Swire* v. *Leach* (18 C. B. (N.S.) 479; 34 L. J. (C.P.) 150); and that the goods were privileged from distress, as things delivered to a person exercising a public trade to be managed in the way of his trade:—*Held*, also, that the company were estopped from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited. Miles *v.* Furber 77

PRIVILEGED COMMUNICATION — *Libel and Slander—Proceedings of Court of Inquiry instituted by Commander-in-Chief under Articles of War—Evidence.*] A court of inquiry, instituted by the commander-in-chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, though not a court of record nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognized in the Articles of War and the Mutiny Acts; and statements, whether oral or written, made by an officer summoned to attend before such court to give evidence, are absolutely privileged, even though they may be made malâ fide and with actual malice, and without reasonable and probable cause.—Such statements are part of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and on grounds of public policy cannot be produced in evidence. Dawkins *v.* Lord Rokeby - - - - Ex. Ch. 255

PROHIBITION—Admiralty—Jurisdiction—Sovereignty - - - - 197
See Admiralty Jurisdiction.

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QUARTER SESSIONS—Appeal—Licence - 146
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—— Appeal—Practice - - - 305, 491
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QUO WARRANTO — *Election to Office — Irregularity not affecting the Result—Discretion of the Court.*] The Court will not allow an information in the nature of a quo warranto to be filed to try the title to an office, merely because there has been an irregularity in the election, in the absence of bad faith, and where the result of the election has not been affected.—At the election of a local board of health, the chairman being about to go out of office, another person was appointed under 11 & 12 Vict. c. 63, s. 21, to act as returning officer in case of the chairman being nominated for re-election. Nomination papers were sent in due course to the chairman, and amongst them one nominating him as a candidate. He nevertheless continued to receive the nomination papers, and when all had been delivered prepared the voting papers, inserting therein the names of the persons nominated as required by s. 24. He did not further act as returning officer, and was returned as re-elected. There was nothing to shew that the names were inserted in the voting papers otherwise than in their proper order, or that the result of the election had been in any way affected by the voting papers having been prepared by the chairman instead of by the person appointed to act as returning officer:—*Held*, that, assuming the chairman's conduct to have been an irregularity, the Court in its discretion ought not to allow an information to be filed against his election, no mischief having been done.—If a chairman were wilfully and contumaciously to act in his own election, the Court might allow an information to go. The Queen *v.* Ward - - - - - - 210

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—— Exemption—Sunday school - - 481
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REAL ACTION—Rent-charge - - 368
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RENT-CHARGE—*Action—Debt—Rent-charge in Fee—Real Action—3 & 4 Wm. 4, c. 27, s. 36.*] Since the abolition of real actions by 3 & 4 Wm. 4, c. 27, s. 36, an action of debt will lie for the recovery of a rent-charge in fee.—Declaration, that the plaintiff, being seised in fee of certain messuages, granted them by indenture to C., subject to the payment to the plaintiff, his heirs and assigns, of a rent-charge, and C. covenanted to pay the rent-charge; that afterwards all the estate of C. vested in the defendant, who did not pay the rent-charge:—*Held*, on demurrer, that the declaration was good: for that the reason why an action of debt would not formerly lie for a rent-charge in fee was, that there was a higher remedy by real action; but that higher remedy having been abolished by 3 & 4 Wm. 4, c. 27, s. 36, the present remedy by action of debt was maintainable. Thomas *v.* Silvester - 368

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RESCISSION OF CONTRACT—*Sale of Goods to be delivered in monthly Quantities.*] The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into the plaintiffs' waggons at the defendants' collieries, in equal monthly quantities during the period of twelve months, at 5*s.* 6*d.* per ton. During the first month the plaintiffs sent waggons to receive only 158 tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only 158 tons, the defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal:—*Held*, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. *Hoare* v. *Rennie* (5 H. & N. 19; 29 L. J. (Ex.) 73) discussed. Simpson *v.* Crippin - - - - 14

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SALE OF BREAD—*Sale otherwise than by Weight —Bread usually sold as "French or Fancy Bread"* —6 & 7 *Wm.* 4, *c.* 37, *s.* 4.] By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same.—The appellants made two kinds of bread, loaves baked in tins, which they called household bread, and which they sold by weight, and bread made in separate loaves, which were put separately in the oven so as to be baked crusty all over, which they called French or fancy bread, and this they did not sell by weight. The justices found, as facts, that the material of which the bread called fancy bread was made in no way differed from the ordinary loaves sold by bakers generally, and except in the manner of baking it in separate loaves it in no way resembled what was called French or fancy bread at the time of the passing of the Act, and was, in fact, only English bread baked so as to have an outside of crust; they were therefore of opinion that the loaves in question were not "French or fancy bread" within the exception of s. 4:—*Held*, that the justices had come to a right conclusion on the facts. Aerated Bread Co. *v.* James Gregg - 355

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—— Breach—Rescission - - - 14
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SECURITY FOR COSTS — *Practice — Insolvent Plaintiff suing as Trustee for another—Liquidation—Receiver.*] The plaintiff, in an action of trover, filed a petition for liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); and a receiver was appointed under Rule 260 of the Bankruptcy Rules, 1869:—*Held*, that the plaintiff was rightly ordered to give security for costs. Malcolm *v.* Hodgkinson - - - - - - 209

—— Deposit - - - - - - 61
See County Court Appeal.

SICKNESS—*Friendly Society—Insanity.*] By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8*s.* per week during any sickness or accident that may befall him, unless by rioting or drunkenness:"—*Held*, that insanity was "sickness" within the meaning of the society's rules. Burton *v.* Eyden - - - - - - - 295

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SHIP—Charterparty—Illegality—Mens rea 202
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SHIP OF FOREIGN STATE—Admiralty jurisdiction - - - - 197
See Admiralty Jurisdiction.

SLIP OF POLICY—*Marine Insurance*—"*Slip*"—*Policy*— 30 *Vict. c.* 23, *ss.* 7, 9.] The defendants, a Liverpool Insurance company, employed the firm of E. & Co. as their agents in London to accept risks and receive premiums in London. The plaintiff instructed P. & Co. to insure for him steel rails, and P. & Co. prepared a slip which was initialed by E. & Co. on behalf of the defendants. According to the course of business observed by the defendants' company, P. & Co. sent a copy slip to E. & Co., who the same night sent it to the defendants at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the defendants then refused to execute any stamped policy:—*Held* (by Quain and Archibald, JJ.; Blackburn, J., dissenting), that no action would lie: for that the initialing of the slip and forwarding the copy slip to the defendants were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the defendants; and as no stamped policy had been executed, 30 Vict. c. 23, ss. 7 and 9, prevented the plaintiff from maintaining an action. Fisher *v.* The Liverpool Marine Insurance Company - - 469

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SPECIAL CONSTABLE—*continued.*
fendants were entitled to notice before the order was made. The Queen *v.* The Cheshire Lines Committee - - - - - 344

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SUBSTITUTION OF PLAINTIFF—*County Court Act* (19 & 20 *Vict. c.* 108, *s.* 57)—*County Court Rule* 122—*Parties to Action—Amendment of Description of Plaintiff—Contagious Diseases (Animals) Act*, 1869 (32 & 33 *Vict. c.* 70) *s.* 57—*Recovery of Expenses—Power of Local Authority to sue in their Local Name.*] By s. 57 of the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70) any person exposing in a fair or other public place any animals affected with a contagious or infectious disease, is to be deemed guilty of an offence against the Act, unless he satisfies the justices before whom he is charged that he was ignorant that the animal was affected and could not with reasonable diligence have obtained the knowledge. The inspector of the local authority may seize any animal so affected and exposed, and in certain cases cause it to be slaughtered, and in other cases remove it to some convenient and isolated spot, there to be kept for such time as the local authority think expedient; "and the local authority may recover the expenses of the execution by them of this section from the owner of the animal."—An action was brought in a county court, in which "J. M., the inspector appointed by the local authority for the county of H., under the Contagious Diseases (Animals) Act, 1869," was plaintiff, and N. S. defendant; in the particulars the local authority claimed 4*l.* 10*s.* for the hire of a meadow for twenty-six days, and the keep and other expenses of certain animals seized under the above section.—The defendant had been summoned before justices for exposing the animals, which were affected with a contagious disease; but the information was dismissed, on the ground that the defendant had not knowledge of it. Objection was taken by the defendant that the action ought to have been brought in the name of the local authority, and not of J. M., the inspector.—The judge, without the consent of the defendant, amended the summons by striking out "J. M." and substituting the "local authority for," &c. as plaintiffs under s. 57 of 19 & 20 Vict. c. 108, and rule 122 of County Court Rules, 1867; and gave judgment for the amount claimed:—

SUBSTITUTION OF PLAINTIFF—*continued.*
Held, first, that the amendment, which was not a substitution of one plaintiff for another, but the amendment of the description of the plaintiff, was rightly made.—Secondly, that, though the local authority were not made a Corporation, yet as s. 57 enabled them to "recover the expenses," they could maintain an action for them in their local name. Thirdly, that the expenses were recoverable independently of whether the owner were convicted or not. Mills *v.* Scott - 496

SUNDAY AND RAGGED SCHOOLS—Rating 481
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SUPERFLUOUS LANDS—*Railway—Lands required under the Act—Superfluous Lands—Limits of Deviation—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 127—*Lands already vested not divested by subsequent Statute.*—By s. 127 of the Lands Clauses Consolidation Act, 1845, lands acquired by a company under their Act, but not required for the purposes of the Act, are to be sold within a prescribed period; and superfluous lands remaining unsold at the expiration of the time limited are "thereupon to vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same."—The defendants, a railway company, after notice to treat, purchased by agreement land of the plaintiffs, which they were empowered by their Act to take, and which was marked upon the plans deposited as being partly within and partly beyond the limits of deviation; on part of the land they constructed their railway, and on part deposited chalk and spoil, which in making the railway was excavated from a cutting. After the construction of the railway the defendants, for several years, let the land on which the chalk was deposited to tenants paying rent:—*Held* (affirming the decision of the Queen's Bench), by Kelly, C.B., Keating and Brett, JJ. (Martin, B., and Byles, J., dissenting), that the whole of the land was land acquired under the Act, and that the land in which the chalk was deposited was superfluous land, which, remaining unsold after the prescribed period, vested in the owners of the adjoining lands.—By a subsequent Act obtained by the defendants, they were empowered to retain and hold any lands, belonging to them, which had not yet been applied to the purposes of the company, for a period of ten years from the passing of the Act:—*Held*, by the whole Court of Exchequer Chamber, affirming the decision of the Queen's Bench, that this enactment did not defeat a right to unsold superfluous land which had vested, under the Lands Clauses Consolidation Act, at the expiration of the time limited, before the passing of the subsequent Act. May *v.* Great Western Railway Co. - - - - Ex. Ch. 26

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TORTIOUS ACT OF SERVANT—*Master and Servant—Railway Company, Responsibility of, for Acts of Servants—Implied Authority to Arrest—*

TORTIOUS ACT OF SERVANT—*continued.*
Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 103 *and* 104.] The plaintiff was a passenger by the defendants' railway with a return ticket from M. to N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2*d.* This he refused to do. He was thereupon given into custody by the inspector of the defendant's station upon the charge of refusing to give up his ticket or pay his fare, and thereby defrauding the defendants. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment:—*Held*, that, as the defendants were impowered under s. 104 of the above Act, to arrest persons committing frauds under s. 103, and as the inspector was their representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendants to arrest persons supposed to be guilty of committing offences against that section, and that the defendants were liable for his mistake. Moore *v.* Metropolitan Ry. Co. - - - - 36

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TURNPIKE TOLLS—Application - 308, 327
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UNION ASSESSMENT COMMITTEE ACT, 1862 (25 *&* 26 *Vict. c.* 103) *ss.* 17, 21—*Deposit of amended Valuation List by Committee—Contribution Order, based on non-deposited List, invalid.*] It is a condition precedent to the validity of a valuation list for a parish, under the Union Assessment Committee Act, 1862, which has been altered by the assessment committee, that it should have been deposited by the committee for inspection, as required by ss. 17 & 21, after the alterations; and an order by guardians of a union on a parish for contributions, based on an altered list which has not been so deposited, is invalid. The Queen *v.* Guardians of Chorlton Union 5

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WEIGHTS AND MEASURES—22 *&* 23 *Vict. c.* 56, *s.* 3—*Light and unjust Weights.*] By s. 3 of 22 & 23 Vict. c. 56, it shall be lawful for every inspector of weights and measures at all reasonable times, to inspect all beams, scales, and balances, and weights and measures in the possession of any person selling, offering, or exposing for sale any goods on any ground or in any public streets . . .; and if upon such inspection any such beams, scales or balances, or weights and measures, shall be found light or unjust, or otherwise contrary to the provisions of this Act and 5 & 6 Wm. 4, c. 63, or if any fraud be wilfully committed in the using thereof, the same shall be liable to be seized and forfeited, and the person using or having the same subject to a penalty.—The appellant had in his possession a spring balance which on inspection was found to be incorrect and unjust, inasmuch as it gave seventeen ounces to the pound weight avoirdupois, being one ounce against the seller, and he was convicted on the ground that the balance could have been used for the purpose of buying as well as selling:—*Held*, that the above section was intended to protect the public against persons selling, and did not apply to the case of a seller using a balance unjust to himself, and that therefore the conviction was wrong. Brooke *v.* Shadgate - - - - - 352

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WILFUL TRESPASS—*Jurisdiction of Justices—Premises connected with Railway*—3 *&* 4 *Vict. c.* 97, *s.* 16.] A railway company were possessed of a thoroughfare which had the appearance of a public street. The company allowed certain cabs to stand in the thoroughfare upon payment of a weekly sum by the drivers. The respondent not being one of the drivers who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company to do so:—*Held*, that the respondent was a wilful trespasser within 3 & 4 Vict. c. 97, s. 16. Foulger *v.* Steadman - - - - - - 65

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